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ABSTRACT

This publication contains material from a 2-day seminar sponsored by the National School Boards Association's Council of School Attorneys. The notebook includes papers prepared by the seminar faculty, court documents, and other information related to the following topics: student threats; current issues of students with disabilities; the Family Educational Rights and Privacy Act, accompanied by details on frequently asked questions and special-education issues; e-mail and access to public meetings and records; prayer in the schools; the Equal Access Act and related issues; legal considerations for measures to promote school safety, with highlights on school searches, dress codes, discipline, zero tolerance, discrimination, and security; hiring and retaining superintendents and dealing with search firms, letters of intent, and incentive agreements; practice tips for defending against temporary restraining orders and preliminary injunctions, with suggestions for necessary pleadings, petitions for injunctive relief, and memoranda to vacate restraining orders in opposition; high-stakes testing; disciplining school-district employees for off-campus actions; fundraising, vending agreements, and advertising; race as a factor in student assignments, including briefs on voluntary desegregation and excerpts from recent cases; Cincinnati's alternative dispute-resolution process; and do-not-resuscitate orders and other issues related to medically fragile students. (RJM)

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2000 Advocacy Seminar

Seminar Course Book
October 12-14, 2000
Wigwam Resort
Litchfield Park, Arizona

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FOREWORD

The National School Boards Associations' Council of School Attorneys is pleased to welcome you to its 2000 Advocacy Seminar presented October 12-14, 2000 at the Wigwam Resort, Litchfield Park, Arizona.

The two-day seminar offers four discussion sessions, six general session topics, and six concurrent sessions. Topics include responding to student threats, current issues of students with disabilities, FERPA, E-mail and access to public meetings and records, the latest on prayer in schools, The Equal Access Act, legal considerations in measures to promote school safety, recent developments in hiring and retaining superintendents, responding to temporary restraining orders, high stakes testing, disciplining employees for off-campus conduct, private businesses and schools, race as a factor in student assignment, Cincinnati's alternative dispute resolution process, do not resuscitate orders and other issues related to medically fragile students.

This notebook contains papers prepared by the seminar faculty, NSBA Council of School Attorneys' members, court documents and other material related to the seminar topics. You will find that the notebook will be a valuable reference tool, since it consolidates in one place documents which otherwise might require hours of research.

We are always striving to improve our seminars and welcome your comments at any time. Please take the time to provide us your written feedback before you leave the seminar. We wish you a pleasant and informative meeting.

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NSBA Council of School Attorneys
2000 Advocacy Seminar
October 12-14, 2000
Wigwam Resort, Litchfield Park, Arizona

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NSBA Council of School Attorneys
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A

RESPONDING TO STUDENT THREATS

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NSBA Council of School Attorneys
Advocacy Seminar
October 12-14, 2000
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RESPONDING TO STUDENT THREATS

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The American Heritage Dictionary defines a threat as "an expression of intention to inflict pain, injury, evil or punishment." That seems clear enough to most people.[1] However, it is a lawyer's instinct and training to read that sort of definition and contrive ingenious "what if's." So, before deciding how to respond to threats by students, we should decide what words or conduct should be of concern to school districts.

Consider these hypotheticals:

- What if a student threatens conduct which he or she is clearly incapable of carrying out?
- What if the threat is conditional?[2]
- Does it matter whether the student actually intends to inflict the injury?
- What if the student is just kidding?
- Does it matter whether the threat is that the speaker will inflict the injury, or that "someone" will, or simply that the victim is doomed?
- Must the victim have heard the threat?
- Must the victim have been intimidated?
- Do threats include the intentional infliction of mental distress?
- Is "hate speech" in and of itself threatening?
- Is sexual harassment inherently threatening?
- What, if anything, is adequate provocation?
- What if the threat is ambiguous?
- Does glaring ominously constitute a threat?
- What about the student's right of free speech?
- Did this young student, neatly dressed and sitting politely in the courtroom, really mean any harm?

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[11] As an Oregon judge noted (citing *Gregory and Kalven, Cases and Materials on Torts*, 1959, p. 21) "Everyone can understand a punch in the nose." *Mays v. Huling Buick Co.*, 246 Or. 203, 424 P.2d 679 (1967).

[2] The classic case is *Turberville v. Savage*, 1 Mod. Rep. 3, 86 Eng. Rep. 684 (1699) in which the words, "If it were not assize-time, I would not take such language from you" were held not to be actionable, because they were spoken during assize-time.

No one expects the school attorney to be an authority on how to make schools safe and stop playground bullying. The school lawyer's responsibility is to use his or her legal knowledge to advise school districts on what rules of student conduct courts will uphold, and what interventions, procedures and sanctions the district can implement. That knowledge will be greatly advanced by reviewing Richard A. Schwartz's article, *Balancing Student Safety and Students' Rights* in *School Law in Review 2000*, and Lisa L. Swem's *Preventing Threats of Violence in Schools From Turning into a Tragedy* in *School Law in Review, 1999.*

WHY THREATS ARE A PROBLEM FOR SCHOOLS

Threats may be, but are not always, carried out. A threat may be followed up with action, but the making of a threat, in and of itself, is difficult to prosecute in criminal court, and may or may not be actionable under tort law.

A student's continued intimidation, resulting from persistent credible threats, could cause the district to be sued. The threat of litigation could be serious, but to a conscientious educator, that is the least of his or her concerns. Schools should be safe havens for students.

Districts now have a social responsibility to take threats seriously. For many years, school districts operated under the apparent assumption belief that learning to deal with intimidation by bullies was part of a student's extra-curricular social education. Recent incidents of school violence and murder, such as those in Springfield, Oregon and Littleton, Colorado, have led schools, the media and law enforcement agencies to focus on earlier statements by the students involved that seem to have foreshadowed the tragedies.

Threats are frequently directed at students with special legal protections. Although no student is entitled to less protection than another, certain students seem to be more frequently targeted for abuse by threats. These include students of minority ethnicity, and girls. Frequently, harassment of minority students and girls takes the form of overt threats of domination or intimidation. When that occurs, the rights of students under antidiscrimination laws are implicated, and the school has special legal duties under federal or state law to intervene effectively.

Threats may be directed a persons who are physically or emotionally vulnerable, but may also be directed to persons with greater status and authority than the threatener. Before firearms became the weapons of choice for troubled children, threats at school most often reflected a power differential between the offender and the victim, such as older boys bullying younger boys, and harassment of girls and minority students. With wide publicity given to incidents involving firearms and explosives, alienated youngsters have been empowered to make believable threats against "preppies," "soshies," teachers and administrators.

Threats frequently involve potential violation of "Gun-free Schools" acts. Society is well past the time of "If you've got a gun, let's see it." Apart from whether or not the threat is likely to result in violence, the school district has a legal duty to have a "zero-tolerance policy" and to involve the police if firearms are potentially involved.

The American public seems have grown less tolerant of intimidation. Possibly because to the widespread availability of guns and explosives, most people are not interested in whether threats are intended to be carried out. Tell airport security that you plan to blow up the plane, and see how much of your fellow passengers care that you were only kidding. If children are threatened at school, there is general public support for the district taking the threat seriously.

Threats are now recognized as impairing children's ability to learn. It is hard to focus on getting an education if you believe someone will beat you up at recess or on the way home.

DEVELOPING APPROPRIATE RESPONSES TO STUDENT THREATS

Do not rely on criminal law, or tort law, to define student conduct. Develop standards of conduct that are appropriate to a school setting. Some state criminal codes may designate "menacing" as a misdemeanor, and define the offense as intentionally, by word or conduct, attempting to place another person in fear of imminent serious physical injury. Schools should be encouraged to intervene against threats that are far less serious than that.

Clearly define the conduct that will subject a student to discipline, suspension or expulsion. For example, a disciplinary code might prohibit "use of threats, intimidation, harassment or corercion against any fellow student or school employee."

Rules of student conduct should be explained and discussed with students as part of their education, rather than left lurking obscurely in a student handbook.

Responses to threatening conduct must be immediate, but should take into account the age and circumstances of the student involved. Discipline of special education students is, of course, subject to special regulation under federal and state law.

Be alert to the potential for a First Amendment free speech claim in every disciplinary proceeding involving threats. In *Lowell v. Poway Unified School District*, 90 F. 3d 367 (9th Cir. 1996) *rev'g.* 847 F.Supp. 780 (S.D. Cal 1994), *cert. denied* 518 U.S.1048, 117 S.Ct. 27, 135 L.Ed.2d 1120 (1996). In its original opinion at 79 F.3d 1510 (9th Cir. 1996), the U.S. Court of Appeals for the Ninth Circuit held that a student's alleged threat to a school counselor was not a true threat, and was therefore protected speech. On further consideration, the court held that if the student had said, as the district contendet, "If you do not give me this schedule change, I'm going to shoot you," the statement would not be protected, because the student could reasonably foresee that the counselor could interpret the statement as a serious expression of intent to harm.

B

DAMAGES IN SUITS INVOLVING DISABLED STUDENTS: ARE SCHOOLS AND SCHOOL OFFICIALS PREPARED FOR MONETARY LIABILITY?

JANET LITTLE HORTON

A. INTRODUCTION

More and more courts are faced with the issue of whether money damages are available for violations of the IDEA. A parent may seek damages for the provision of inadequate special education services, or the lack of services, even if IDEA is not specifically pled as a basis for the cause of action. With Congress' pervasive emphasis in the reauthorized IDEA on including special education students in the general curriculum, disabled children are affected by or a party to incidents of violence more than ever before. When a special education student assaults, or is assaulted by, a fellow student, the victim's parents may seek money damages as redress for these injuries. More frequently now, parents are seeking monetary damages for inappropriate educational services. The damages sought are not merely reimbursement for educational services the parents have provided, but are tort-like damages. Because a special education hearing officer cannot assess monetary damages, aggrieved parties pursue their claims through the judicial system. Parents filing such actions assert both federal and state law causes of action. Theories of recovery advanced by plaintiffs include claims under IDEA, § 1983, Title IX, the Americans with Disabilities Act (ADA), § 504, and state tort law. As the pace of these suits are increasing, schools must get prepared for potential monetary liability, including damages against school officials in their individual capacity.

B. SECTION 1983 AND THE IDEA

The federal courts are split over the issue of whether a plaintiff can bring a § 1983 action for a direct violation of the IDEA. In *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457 (1984), the Supreme Court considered whether plaintiffs could pursue a § 1983 claim based on the Rehabilitation Act or Equal Protection Clause of the Fourteenth Amendment to the United States Constitution when those claims were virtually identical to claims made under the IDEA. The Supreme Court found that the IDEA's comprehensive scheme was sufficient to constitute the exclusive avenue through which the child and the child's parents could pursue their claim. However, in 1986, Congress amended the EHA/IDEA by adding Section 1415(f) which provided: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities..." 20 U.S.C. § 1415(f). (The 1997 amendments to this provision add the Americans with Disabilities Act (ADA) among the enumerated federal statues, change the term "Federal statutes" to "Federal laws" and deleted "and youth". 20 U.S.C. § 1415 (l).)

Some post-1986 amendment cases have read § 1415(f) (now § 1415(l))and the associated legislative history to permit plaintiffs to bring § 1983 actions for a direct violation of the IDEA.

Cases decided by the Ninth, Tenth and Eleventh Circuits and a federal district court in the Fourth Circuit have examined the issue of whether a plaintiff may bring a § 1983 action as a vehicle for alleging a violation of the IDEA. These courts have indicated a willingness to allow such claims, or suggested in dicta that such an action is available. Frequently, there is no specific holding because the parents have not exhausted administrative remedies prior to filing a lawsuit in court. *See Doe v. Arizona Dep't. of Educ.*, 111 F.3d 678 (9th Cir. 1997) (dismissing both the IDEA claims and the § 1983 claims based on violation of the IDEA for failure to exhaust administrative remedies); *N.B. v. Alachua County School Board*, 84 F.3d 1376, *cert. denied*, 117 S.Ct. 769 (1997) (11th Cir. 1996)(holding that because the plaintiff failed to exhaust administrative remedies, she could not proceed with her § 1983 claims for a violation of the IDEA); *Association for Community Living in Colorado v. Romer*, 992 F.2d 1040 (10th Cir. 1993)(holding that absent one of three exceptions, a plaintiff must exhaust administrative remedies before bringing a § 1983 action for relief that is also available under the IDEA); *Doe v. Alfred*, 906 F.Supp. 1092 (D.C. W.Va. 1995) (holding that a plaintiff must exhaust her administrative remedies before pursuing a § 1983 claim for damages based on a violation of the IDEA).

The Second and Third Circuits are more clear in their holdings that parents may bring a § 1983 action based on alleged violations of IDEA. *See Mrs. W. v. Tirozzi*, 832 F.2d 748 (2nd Cir. 1987); *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995) (exhaustion excused where relief sought by plaintiff was not available in IDEA administrative hearing). The Fifth Circuit has issued decisions that a § 1983 cause of action exists. *See Angela L. v. Pasadena Indep. Sch. Dist.*, 918 F.2d 1188 (5th Cir. 1990)(noting in a footnote that the 1986 amendments to the EHA ensured that parents may bring § 1983 and Section 504 claims to obtain relief not available through the EHA); *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623 (5th Cir. 1986)(noting in a footnote that even if Congress had not amended the EHA in 1986, the Court believed that the plaintiff could bring a § 1983 action because *Smith v. Robinson* was limited to equal protection claims); *Morris v. Dearborne*, 181 F.3d 657 (5th Cir. 1999) (noting in a footnote that violations of IDEA rights may be pursued through § 1983).

Conversely, the Fourth, Seventh, and Eighth Circuits, as well as a district court in the First Circuit, have held that a plaintiff may not bring a § 1983 action for a direct violation of the IDEA. *Sellers Ex Rel. v. School Board of the City of Manassas*, 27 IDELR 1060 (4th Cir. Apr. 13, 1998); *Charlie F. v. Board of Education*, 98 F.3d 989 (7th Cir. 1996); *Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996); *Andrew S. by Margaret S. v. The School Committee of the Town of Greenfield, Massachusetts*, 30 IDELR 972 (D.C. Mass. Aug. 5, 1999). Moreover, although not precluding a § 1983 action for an IDEA violation, the Sixth Circuit has held that a plaintiff may not recover damages under § 1983 for an IDEA violation. *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 980 F.2d 382 (6th Cir. 1992).

C. SECTION 1983 AND CONSTITUTIONAL CLAIMS

In many of the cases involving a disabled student, the parent of the disabled student asserts a § 1983 claim tied to an alleged constitutional violation. To prevail on a § 1983 claim, a party must establish that a person acting under color of state law has deprived the party of a right secured by the

Constitution or laws of the United States. Section 1983 is not the proper venue for violations amounting to only negligence or breaches of duty of care arising from tort actions. *Baker v. McCollan*, 443 U.S. 137, 140, 99 S. Ct. 2689, 2695 (1979).

A school district may be liable under §1983 if the constitutional deprivation results from the implementation of an official policy, custom, or practice of the district. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 2035-36 (1978). The custom must be well established and must be causally connected to the constitutional deprivation for liability to attach. The school district itself must be a wrongdoer. *Collins v. City of Harker Heights*, 503 U.S. 115, 122, 112 S. Ct. 161, 1067 (1992). Individual state actors may be liable under § 1983 if they transgressed a constitutional right that was clearly established at the time of the alleged violation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19, 102 S.Ct. 2727, 2738 (1982). Parents of disabled students allege violations of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to support a § 1983 claim.

1. Equal Protection Clause

A § 1983 claim for an Equal Protection Clause violation requires a showing that the school district purposefully discriminated against the plaintiff. *See Washington v. Davis* 426 U.S. 229, 239 (1976). To prevail a party must show that the school district treated him or her differently or treated his or her complaints differently than those of a similarly situated group. *See Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999).

Sexual harassment by a state actor can constitute a violation of the Equal Protection Clause. *Murrell v. School Dist. No. 1*, 186 F.3d 1238, 1249 (10th Cir. 1999). To hold a school district liable for discriminatory practices of its employees, "a plaintiff must demonstrate that a state employee's discriminatory actions are representative of an official policy or custom of the . . . institution, or are taken by an official with final policy making authority." *Id.* (citing *Randle v. City of Aurora*, 69 F.3d 441, 446–50 (10th Cir. 1995). The policy must be officially adopted or promulgated by the school board or a discriminatory practice so "well-settled as to constitute a custom or usage with the force of law." *Id.* Individual liability may arise if the state actor participates in or refuses to remedy known sexual harassment by a third party. *Id.* at 1250–51.

2. Substantive Due Process Right Against Bodily Intrusions

In the few cases in which a plaintiff has prevailed against a school district in an action for relief from an injury caused at the hands of another student, the plaintiff brought suit under § 1983 alleging a due process violation. The Due Process Clause protects a person's liberty interest in the right to be free of bodily intrusion caused by state actors. *Ingraham v. Wright*, 430 U.S. 651, 673-74, 97 S. Ct. 1401 (1977). However, where the person violating the right is not a state actor, but is another student, the Due Process Clause may not afford the plaintiff the relief he or she is seeking.

The Due Process Clause does not demand that school districts affirmatively act to protect its students from harm. *See DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 195, 109 S. Ct. 998, 1002 (1989). Two exceptions exist to this limit on a school district's liability for violence perpetrated by a private actor. A school district may be liable if it has a special relationship with the injured party, or if it created or increased the danger or made the injured party more vulnerable to it. *See Stevens v. Umstead,* 131 F.3d 697, 701 (7th Cir. 1997).

a. Special Relationship

A special relationship exists in cases where the state affirmatively acts to restrain "the individuals' freedom to act on his own behalf - through incarceration, institutionalization or other similar restraint of personal liberty - which is the 'deprivation of liberty ' triggering the protections of the Due Process Clause; not its failure to act to protect his liberty interests against harms inflicted by other means." *DeShaney*, 489 U.S. at 200, 109 S.Ct .at 1006. In *DeShaney*, the Supreme Court found that this special relationship exception did not apply to hold a state agency liable for the abuse inflicted on a child by his father despite repeated reports of abuse logged with the agency.

The Supreme Court has found this special relationship to exist in two types of situations. In *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285 (1976), the Court recognized a duty to provide medical care to incarcerated prisoners whose state directed restraint prevented them from obtaining such care on their own. *See also City of Revere v. Massachusetts Gen'l Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 2983 (1983)(the Due Process clause requires a governmental agency to provide medical attention to suspects injured while being apprehended by the police and subsequently detained). In *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452 (1982), the Court imposed a duty to provide patients who are involuntarily committed to a mental institution with care and services necessary for safety from themselves and others.

Although the Supreme Court has not expanded this list, federal courts have extended the situations creating a special relationship with the state to include children removed from the parental home and placed in state custody. *Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995); *Yvonne L. by and through Lewis v. New Mexico Dep't of Human Servs.*, 959 F.2d883 (10th Cir. 1992); *K.H., through Murphy v. Morgan*, 917 F2d 846 (7th Cir. .1990); *Griffith v. Johnston*, 899 F. 2d 1427 (5th Cir. 1990); *Taylor by and through Taylor v. Ledbetter*, 818 F. 2d 791 (11th Dir. 1987); *Doe v. New York City Dept of Soc. Servs.* 649 F. 2d 134, (1981), *after remand*, 709 F. 2d 782 (2d Cir. 1981).

i. Do Compulsory Attendance Laws and In Loco Parentis Status Create a Special Relationship?

The Third, Eight, and Tenth Circuits have specifically examined whether state compulsory attendance laws and/or in loco parentis status affects a custody arrangement sufficient to create a special relationship. Each of these circuit courts have held that these laws do not create a special relationship. *Dorothy J. ex rel. Brian B. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992); *D.R. v. Middle Bucks Area Vocational Tech.*

Sch., 972 F.2d 1364 (3rd Cir. 1992). An opinion concurring in the judgment only in *Walton ex rel. Walton v. Alexander*, 44 F.3d 1297 (1995) noted that the en banc opinion overruling of a portion of *Lopez v. Houston Independent School District*, 817 F.2d 351 (5th Cir. 1987), indicates that "compulsory school attendance laws impose no constitutional duty on school officials or employees."

Conversely, federal district courts in three other circuits have found a special relationship to exist between students and the school district or school district employee. *See Waecheter v. School Dist. No. 14-030*, 773 F.Supp. 1005 (W.D. Mich. 1991)(holding that a custodial relationship existed between a special education student and a recess supervisor who imposed excessive disciplinary tactics in light of supervisor's knowledge of the student's handicapping limitations); *Tilson v. School Dist. of Philadelphia*, 1990 WL 98932 (E.D. Pa. July 13,1990)(declaring that a preschooler unable to defend against molestation by an adult deserves the same constitutional protection as prisoners and the institutionalized); *Pagano ex rel. Pagano v. Massapequa Pub. Schs.*, 714 F.Supp. 640 (E.D.N.Y. 1989)(holding that school district owed elementary students who were required to attend school by state law some duty of care which may or may not rise to the level required in prison or institutional situations).

ii. Does Enrollment in a Residential State School Create a Special Relationship?

Two circuit courts indicate that enrollment in a residential state school alone does not create a special relationship. The Fifth and Seventh Circuit courts have ruled that voluntary enrollment in a state residential school did not create the type of special relationship contemplated by *DeShaney* and subsequent cases. *See Stevens v. Umsted*, 131 F.3d 697(7th Cir. 1997); *Walton Ex Rel. Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995).

b. State-Created Danger

The second exception to the rule that the state bears no responsibility to protect its citizens against acts of private parties exists when the state has created the danger to which the victim falls prey. Post-*Deshaney* courts have read the state-created danger exception to require state actors to knowingly place a person in danger, to create the plaintiff's danger or to render him or her more vulnerable to the danger. *See e.g. Stevens v. Umsted*, 131 F.3d 697, 704 (7th Cir. 1997); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 913 (6th Cir. 1995); *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d at 1373; *Wood v. Ostrander*, 879 F.2d. 583 (9th Cir. 1989); *Cornelius v. Town of Highland Lake*, 880 F.2d. 348 (11th Cir. 1989); *Wells v. Walker*, 852 F. 2d. 368, 370 (8th Cir. 1988); *White v. Rochford*, 592 F.2d 381, 384-385 (7th Cir. 1979).

D. TITLE IX

Title IX is a potential cause of action when the actions by or against the disabled student involve sexual harassment. Title IX provides that no person shall be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance on the basis of sex. 20 U.S.C. § 1681. The United States Supreme Court has held that Title IX is enforceable as an implied private right of action and supports a claim for monetary damages. Until May of 1999 when the Supreme Court decided *Davis v. Monroe County Board of Education*, 526 U.S. 639, 119 S. Ct. 1661 (1999), the lower federal courts applied varying standards in peer sexual harassment cases. In a 5-4 decision, the Supreme Court enunciated in *Davis* the test by which peer sexual harassment cases are to be decided. Under the *Davis* test, a school district will be liable for peer sexual harassment if the school administrative officials had actual knowledge of the harassment and were deliberately indifferent to the harassment. Further, the harassment based on gender must be so severe, pervasive, and objectively offensive that it has the systemic effect of denying the student an equal educational opportunity, according to the Court.

E. SECTION 504

Section 504 of the Rehabilitation Act prohibits discrimination against otherwise qualified individuals because of a disability. Section 504 is frequently cited as a basis for damages in a court action. With regard to the education of disabled students, discrimination under § 504 is more than a mere failure to provide a free appropriate public education required by IDEA. Rather, proof of bad faith or gross misjudgment must be shown before a violation of § 504 will be found. *See Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982); *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1580 (D.C. Cir. 1984); *Hoekstra v. Independent Sch. Dist. No. 283*, 103 F.3d 624, 626-27 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1852 (1997); *Birmingham v. Omaha School District*, 220 F.3d 850 (8th Cir. 2000); *Wenger v. Canastota Cent. Sch. Dist.*, 979 F.Supp. 147, 152 (N.D.N.Y. 1997); *Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998); *K.U. v. Alvin Independent School District*, 27 IDELR 347 (S.D. Tx. 1998); *R.B. v. Board of Education of City*, 99 F.Supp.2d 411 (S.D. N.Y. 2000).

F. AMERICANS WITH DISABILITIES ACT

Similar to Section 504, Title II of the ADA prohibits a qualified individual with a disability from being excluded from participation in or the benefits of the services, programs or activities of a public entity. Courts have held that where ADA violations are based on educational services for disabled children, the plaintiff must prove that school officials acted in bad faith or with gross misjudgment, the same standard applied in Section 504 cases. *Hoekstra v. Independent School District No. 283*, 103 F.3d 624 (8th Cir. 1996); *Birmingham v. Omaha School District*, 220 F.3d 850 (8th Cir. 2000); *R.B. v. Board of Education of City*, 99 F.Supp.2d 411 (S.D. N.Y. 2000).

G. STATE LAW TORT CLAIMS AND IMMUNITY

In addition to claims made under federal statutes, parents often bring state tort claims asserting causes of action under various theories including negligence, gross negligence, negligent supervision, intentional infliction of emotional distress, and assault and battery. The success of these claims varies greatly from state to state depending on the immunity laws applicable in the given jurisdiction. For instance, in Texas, immunity derives from both statutory and case law. Texas courts have repeatedly declared that independent school districts are agencies of the state and while exercising governmental functions are immune from suits against them grounded in negligence. The Texas tort claims statute exempts school districts from liability with the single exception that school districts may be liable for damages arising from the negligent operation or use of a motor vehicle. Texas statutes grant immunity to individual employees when the employee acts within the scope of his or her duties and exercises discretion, unless the case involves the use of excessive force in the discipline of students which results in injury, or the negligent use or operation of a motor vehicle.

Many states rely on the distinction between ministerial and discretionary functions in determining whether an individual may be liable under state tort law. For example, in *Moses v. Minneapolis Public Schools*, 29 IDELR 476 (Minn. Dec. 8, 1998), the parents of a disabled child filed a negligent school suit claiming the student was injured as a result of various incidents. The parents claimed that the level of supervision by the child's teacher was less than adequate in monitoring the child and implementing his IEP. The Minnesota state court ruled that a school district has a duty to use reasonable care in supervising students and that an aggrieved parent may recover from a school district for negligent supervision if that supervision would have prevented the accident. The school district and the teacher claimed official immunity. The Minnesota appellate court held that because the IEP made specific recommendations and provided guidelines for dealing with the disabled child, the teacher's conduct in supervising him involved the exercise of merely a ministerial duty not protected by official immunity.

Other state law claims relating to special education students appear in the synopsis of cases below. Tort liability and immunity varies widely from state to state. In some states, the tort claims act or other state statute may state exceptions for liability, while in other states the statutory or case law may totally abrogate or waive immunity of the public schools. Accordingly, it is important to check both state statutes and case law to determine the full extent of the protection afforded to school districts and individual school employees with regard to state tort claims.

H. IMMUNITY

In addition to the immunity prescribed under state law, federal courts also recognize limitations to liability from suit.

1. School Districts

Section 1983 suits alleging a violation of constitutional or statutory rights afford a plaintiff a cause of action when two elements are present: (1) the conduct complained of is committed by a state official; and (2) that conduct deprives the person of a federal statutory or constitutional right. *See generally, Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689 (1979); *Parratt v. Taylor*, 541 U.S. 527, 101 S.Ct. 1908 (1981). Local governmental units, such as school districts, are considered "persons" to which § 1983 applies. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690–91, 98 S.Ct. 2018, 2035–36 (1978). Thus, school districts cannot be held liable under § 1983 unless a person is deprived of a constitutional or federal statutory right.

A school district may not be found liable under a *respondeat superior* theory for the acts of its employees. *Id.* at 690–91. The school district itself must be the wrongdoer. *See Collins v. City of Harker Heights*, 503 U.S. 115, 122, 112 S. Ct. 161, 1067 (1992). Liability may only attach in cases where the act is pursuant to a district policy, custom, or practice. *Id.* In *City of Canton v. Harris*, 489 U.S.378, 109 S.Ct. 1197 (1989), the Supreme Court clarified that in examining this standard, a court will determine whether a state agency made a "deliberate choice to follow a course of action from among various alternatives by city policymakers." *Id.* at 389.

Disabled students may allege that the negligence and/or gross negligence of school officials deprived them of their constitutional rights and caused their injuries. However, merely negligent conduct is not actionable under the Constitution. In *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668 (1986)., the Supreme Court held that a person's constitutional rights protected under § 1983 are not implicated by the negligent acts of a state official causing an unintended loss of or injury to life, liberty or property.

2. Individual Employees

Individual school employees are often sued in their official capacities. Actions for damages against a party in his or her official capacity are, in essence, actions against the governmental entity of which the officer is an agent. *Universal Amusement Co., Inc. v. Hofheinz*, 646 F.2d 996, 997 (5th Cir. 1981). Hence, the same standard must be applied to § 1983 liability for officials sued in their official capacities as is applied to the governmental entity itself. That is, a governmental officer must participate in the implementation of a policy or toleration of a custom which causes the deprivation of a plaintiff's constitutional or federal statutory rights.

Liability in the school official's individual capacity requires a different analysis. The United States Supreme Court has addressed the issue of individual liability under § 1983 on numerous occasions. In *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the Court held that in actions brought under the United States Constitution against federal officials, the immunity of these officers could only be defeated by a showing of their lack of objective good faith. *Id.* at 2738. In *Davis v. Scherer*, 104 S.Ct. 3012 (1984) the court applied the holding of *Harlow* directly to state governmental agencies stating that, in a § 1983 action, "[o]fficials are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 3020.

As a result of *Davis*, school officials are not liable under § 1983 in their individual capacities unless, while acting within the scope of their employment, they violate constitutional rights of a person that are clearly established at the time of the disputed incident. In making this analysis, a court must first determine whether a plaintiff "has asserted a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 1793 (1991).

The requirements for establishing the liability of individual school officials under § 1983 were made even more stringent by the United States Supreme Court in *Mitchell v. Forsyth*, 105 S.Ct. 2306 (1985). The Court in *Mitchell* stated that unless a plaintiff's allegation establishes a clear violation of an established constitutional right, a defendant is entitled to summary judgment on that issue prior to even the commencement of discovery. *Id.* at 2316. Furthermore, a denial of summary judgment based on the doctrine of qualified immunity is an interlocutory decision which is immediately appealable notwithstanding the absence of a final judgment. *Id. See also Johnson v. Jones*, 115 S.Ct. 2151 (1995) (limiting interlocutory appeals solely to questions of law).

At least two courts have specifically addressed the issue of liability of an individual pursuant to § 1983 for violations of the IDEA. In *Padilla v. School District No. 1*, 29 IDELR 870 (D.C. Col. 1999), the court examined court opinions issued before or around the time of the 1986 amendments and disagreed with previous holdings that § 1983 suits were not available to enforce IDEA rights. The court cited a number of opinions in which courts assumed that a cause of action existed against individuals for substantive violations of IDEA. *See Hayes v. United Sch. Dist. No. 377*, 877 F.2d 809 (10th Cir. 1989); *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995); *Walker v. District of Columbia*, 969 F.Supp. 794 (D.D.C. 1997). The *Padilla* court denied the defendant's motion to dismiss the § 1983 claim because the IDEA does not allow individual liability suits. The Court found that exhaustion of remedies was not required because of the relief the parent was seeking. It found that damages are available through § 1983 for violations of IDEA. It found that individual liability pursuant to § 1983 was permissible and denied qualified immunity to most defendants in their individual capacities.

In *Butler v. South Glens Falls*, 106 F.Supp.2d 414 (N.D. N.Y. 2000), the student was provided special education services periodically when the school deemed him eligible. After success in the administrative hearing, the parent sued in court seeking damages pursuant to IDEA, among other issues. The court refused to find the individual defendants had official immunity. The facts pled by the parent, that the school had failed to provide, or provided inadequate special education services over several years, was sufficient to state a claim for violation of a clearly established right of which a reasonable school official would have known.

I. DAMAGES

A split exists among the circuit courts as to whether damages are available under the IDEA. The Third and Fifth Circuit Courts as well as district courts in the Second, Ninth, and Tenth Circuits have indicated that a plaintiff may receive damages for an IDEA violation. *See W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995) (holding that damages for a violation of the IDEA are available in a § 1983 action and stating that the IDEA did not expressly foreclose the possibility of a claim for damages directly under the IDEA); *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458 (5th Cir. 1995) (affirming the district court's award of nominal damages for an IDEA procedural violation without providing analysis as to the general availability of damages for a direct violation of the IDEA); *Jackson v. Franklin County Sch. Bd.*, 806 F.2d 623 (5th Cir. 1986) (allowing the granting of either compensatory or nominal damages upon remand for IDEA procedural violations although the holding is unclear whether damages would be authorized by IDEA or by a separate due process claim); *L.C. v. Utah State Bd. of Educ.*, 30 IDELR 961 (D.C. Utah July 27, 1999) (holding that IDEA claims may be enforced by § 1983 and that money damages may be available as appropriate relief); *Cappillino v. Hyde Park Central Sch. Dist.*, 30 IDELR 253 (S.D.N.Y. March 26, 1999) (concluding that nothing in IDEA precludes an award of money damages); *Butler v. South Glens Falls*, 106 F.Supp. 2d 414 (N.D. N.Y. 2000) (compensatory damages are not available directly under IDEA, but damages may be available in a § 1983 case based on violation of IDEA); *Padilla ex rel. Padilla v. School Dist. No. 1*, 29 IDELR 870 (D.C. Colo. Jan. 19, 1999); *Emma C. v. Eastin*, 26 IDELR 1140 (N.D. Cal. Oct. 17, 1997).

In contrast, the Fourth, Sixth, Seventh, Eighth, and Ninth Circuit Courts, as well as district courts in the D.C. Circuit and the Second Circuit, have ruled that damages are not available under the IDEA. *See Witte v. Clark County Sch. Dist.*, 1999 WL 1080164 (9th Cir. 1999); *Sellers ex rel. Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. Apr. 13, 1998) (tort-like damages are inconsistent with IDEA's statutory scheme which strongly favors provision or restoration of educational rights); *Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996); *Birmingham v. Omaha School District*, 220 F.3d 850 (8th Cir. 2000); *Charlie F. v. Board of Educ. of Skokie Sch. Dist.* 98 F.3d 989 (7th Cir. 1996) (relief intended under IDEA includes only prospective or restitutionary type relief, not general damages); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 980 F.2d 382 (6th Cir. 1992); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991) (recovery for loss of earing potential due to an alleged violation of the IDEA during the time the student attended public school is not available under the statute); *Andrew S. ex rel. Margaret S. v. The School Comm. of the Town of Greenfield*, 30 IDELR 972 (D.C. Mass. Aug. 5, 1999); *Wenger v. Canastota Central Sch. Dist.*, 26 IDELR 1128 (N.D.N.Y. Oct. 3, 1997) (the IDEA does not provide for compensatory money damages); *Walker v. District of Columbia*, 969 F.Supp. 794 (D.C.D.C. 1997). *See also Marvin H. v. Austin Independent Sch. Dist.*, 715 F.2d 1348 (5th Cir. 1983) (holding that appropriate relief under EAHCA generally includes only prospective relief and that damages are not consistent with the goals of the statute, in contrast to the later Fifth Circuit decision in *St. Tammany*).

J. SOME SPECIFIC CASES INVOLVING DAMAGES

1. Complaints about Educational Services

a. *Covington v. Knox County School System*, 205 F.3d 912 (6th Cir. 2000)

The parent brought a § 1983 claim against the school and school officials alleging only a violation of her child's constitutional rights related to the use of a time-out room. She alleged her son had been locked in the time-out room for hours at a time with no supervision. She sued the school officials in their official and individual capacities. The parent had begun but not completed the IDEA administrative hearing process. The appellate court dismissed the district court's grant of summary judgment for failure of the parent to exhaust administrative remedies under IDEA and remanded. The court agreed that exhaustion was futile, but not because the parent was seeking money damages. Otherwise, any parent could circumvent the exhaustion requirement of IDEA by simply adding a damages claim. Rather, exhaustion was futile because the student had graduated, his injuries were wholly in the past, and no equitable relief pursuant to IDEA would make him whole. The court did not address whether the parent's constitutional complaints fell within the "ambit of IDEA", or whether she had to exhaust IDEA administrative remedies even if her claim was independent of the IDEA.

b. *Butler v. South Glens Falls Central School District*, 106 F.Supp.2d 414 (N.D. N.Y. 2000)

This case involved an emotionally disturbed student who entered junior high school in 1990. In 1991, he was declassified and no longer considered a special education student. He continued to have behavior, attendance and academic problems. In 1993 he was evaluated for learning disabilities and was diagnosed with ADHD. He stopped attending high school in the fall of 1993 because of disputes with the principal over parking and with the nurse over medication. In early 1994 he was classified as multiply disabled. His mother rejected the recommendation of a day treatment program. She also rejected home tutoring, then requested a hearing. In 1995, the IDEA hearing officer found in favor of the parent that the declassification in 1991 was in error and the 1994 IEP was inadequate. He recommended a different label (OHI) and a different IEP. Neither party appealled. Over the next year, the school district proposed three IEP's. The parent did not agree with any of them. She home schooled him through Clonlara School. The school district asked for a hearing. Ultimately a state review officer after the administrative hearing determined that the IEP's the school had offered were inappropriate but did not award any reimbursement to the parent because she had not shown the Clonlara School to be appropriate.

The parent sued in federal court alleging a violation of IDEA, § 504, § 1983, ADA and FERPA, as well as state law claims. She sought compensatory education, reimbursement for tuition and related services, compensatory and punitive damages.

The court held that compensatory and punitive, tort-like damages are not available under IDEA, only reimbursement. However, the court came to the opposite conclusion with regard to the § 1983 claim alleging violations of IDEA. Noting that the Second Circuit has not ruled whether money damages are available under § 1983 for IDEA violations, the court declined to grant summary judgment and let this claim stand. The court was persuaded by the reasoning in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028 (1992) regarding Title IX claims for damages. There is no clear direction by Congress that the federal courts do not have the power to award any appropriate relief in a § 1983 case based on IDEA violations.

The court also did not grant summary judgment for the school district on the § 504 damages claim. Finding intentional discrimination evidencing bad faith or gross misjudgment to be the standard, the court let this claim stand based on the specific facts alleged of a continual failure to provide FAPE over several years. The court left open the possibility of punitive damages under § 504, also.

Finally, the court addressed the individual defendants' claims that if there was a cause of action pursuant to § 1983 for violations of IDEA, they had official immunity in their individual capacities. To defeat qualified immunity, the Plaintiff must do more than show the right to FAPE was clearly established at the time. Rather, the Plaintiff must show the particular actions school officials took were impermissible under the law established at that time. In denying qualified immunity for the individuals, the court found at the time it was a clearly established right for an IEP to be in place and implemented, and for a student not to be disciplined for behavior caused by his disability, both of which were questions of fact in the case. The court did dismiss a state law claim for educational malpractice.

c. *R.B. v. Board of Education of City*, 99 F.Supp.2d 411 (S.D. N.Y. 2000)

A parent brought suit, alleging claims under § 1983, § 504, IDEA, ADA and state laws after her emotionally disturbed child was without educational services for almost a year because the school did not make sufficient attempts to find a private placement called for in the IEP. In an IDEA hearing, the hearing officer described the school's actions as "tantamount to gross neglect". The court denied the school district's motion to dismiss.

The court held that the plaintiff had exhausted administrative remedies through the IDEA administrative hearing even though she did not appeal the decision to the state review officer. There was no need for her to appeal because she won the case.

The court noted that the issue of whether money damages for violation of IDEA pursuant to a § 1983 cause of action are available is not settled. The court relied on the reasoning in *Franklin v. Gwinnett County* and found there is no clear direction in the IDEA or its legislative history sufficient to rebut the presumption that all relief, including money damages, is available. The award of money damages was not precluded as a matter of law. Whether money damages would be appropriate relief would have to be addressed after discovery. The § 1983 claim was not dismissed because the plaintiff's pleadings alleged a policy or custom of inaction and deliberate indifference toward the deprivation of the student's IDEA rights. The plaintiff's ADA and § 504 claims were allowed to continue. Both statutes require a finding of bad faith or gross misjudgment for monetary liability. The plaintiff alleged sufficient facts that school officials' actions in failing to provide appropriate educational services for almost a year were bad faith or gross misjudgment.

d. *Reid v. Petaluma Joint Union High School District*, 2000 W.L. 1229059 (N.D. Cal)

This case involved a claim for damages under IDEA, or § 504. The two brothers were diagnosed with ADD but found ineligible for IDEA services by the school for several years. The court dismissed the claim for damages under IDEA, finding that a "tort-like claim for educational malpractice" is inconsistent with IDEA's preservation of rights to educational services. Although the plaintiffs alleged bad faith, gross misjudgment or deliberate indifference on the part of school officials to support the § 504 claim for damages, the summary judgment evidence showed the opposite to be true. Each time the claims for IDEA services were presented by the parents, they received review and analysis. There may have been incorrect evaluations or errors in professional judgment, but nothing that would rise to the level of bad faith, gross misjudgment or deliberate indifference to the boys' rights under IDEA.

2. Assaults on Disabled Students

a. *Soper v. Hoben*, 195 F. 3d 845 (6th Cir. 1999)

Renee Soper, a mentally retarded student enrolled in a special education program at a public middle school, was harassed, sexually molested, and raped by three of her special education classmates at school and on the school bus. Renee's parents sued the school district, her teacher, the school principal, the Director of Special Education, the Superintendent, and the Board of Education alleging state law claims for negligence and gross negligence and claims for violations of § 1983 and Title IX. The Federal District Court granted the defendants' motion for summary judgment.

The plaintiffs brought both an equal protection and a due process claim under § 1983. As for the equal protection claim, the Court held that the plaintiff did not produce evidence to show that Renee's complaints were treated differently than those of her male counterparts. The Sixth Circuit recognized that the Due Process clause protects a person's right to bodily integrity. Relying on two prior Sixth Circuit opinions, the Court enunciated that neither the compulsory school attendance laws nor the in loco parentis status sufficiently restrains students to create a special relationship between students and the school district. Thus, under *DeShaney*, no constitutional violation occurred because no special relationship existed between Renee and the public officials. Moreover, the Sixth Circuit found that both the individual defendants and the district and board were shielded from liability under the doctrine of qualified immunity.

In terms of the Title IX claim, the Court examined the facts in light of the recently decided *Davis v. Monroe County Board of Education.*, 526 U.S. 629, 119 S.Ct. 1661 (1999). Although in pre-*Davis* cases the courts did not always agree on whether individual officials or employees could be liable under Title IX, the *Soper* court cited *Davis* as standing for the proposition that only recipients of federal funds may be liable for damages under Title IX, not individuals. In analyzing the *Davis* four-part test, the Sixth Circuit determined that the plaintiff could not be successful on a Title IX claim because she did not allege facts that demonstrated that the defendants had actual knowledge of the harassment until after the harassment had occurred.

Regarding the state tort claims, the Sixth Circuit determined that the state law regarding absolute governmental immunity from tort liability shielded all of the defendants from being liable for the acts alleged in Ms. Soper's claims. Michigan law by statute provides for absolute and governmental immunity from tort liability. The Michigan immunity statute does not distinguish between discretionary and ministerial duties. The only exception to that broad grant of immunity is when the employee's or volunteer's conduct amounts to gross negligence. Michigan statute defines gross negligence as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. The *Soper* Court determined that the district court correctly ruled that reasonable minds could not find that the failure to have a policy in effect to protect at-risk students or the failure to place a paraprofessional in the child's classroom constituted gross negligence and thereby dismissed the state claims under state immunity.

b. ***Dorothy J. Ex Rel. Brian B. v. Little Rock School District*, 7 F.3d 729 (8th Cir. 1993)**

Brian B. is a mentally retarded student who was sexually assaulted by another mentally retarded student in the boys' shower at a public high school. Asserting a § 1983 due process claim, Brian's mother sued the school district and two of its employees, as well as a state agency, a private foster care agency, and several of their employees. The district court dismissed the suit on the basis that no constitutional duty existed to prevent the act of violence by a private party. Even though the boy who assaulted Brian was a ward of the state of Arkansas, the Eight Circuit determined that he was not a state actor. Moreover, each of the defendants were aware that the aggressor had a history of violent and sexually assaultive behavior. The Eighth Circuit discerned that *DeShaney* focuses on the nature of the custodial relationship in determining whether a special relationship exists. The court agreed with other circuit court cases that neither compulsory school attendance laws nor the school's in loco parentis status create the kind of custodial relationship that imposes a duty to protect a student from a private actor. Moreover, Brian's status as a special education student did not alter the equation. The court stated that there was no allegation that the state involuntarily placed Brian in a particular program or took any affirmative act to restrain his individual freedom to act on his own behalf.

The plaintiff alleged that the Court should sustain a claim for state-created danger against the agencies because they affirmatively placed Brian in a program with vulnerable children knowing the perpetrator's history. Because the state agencies were not more directly implicated in affirmatively placing the mentally retarded student in a position of danger, the Eighth Circuit declined to find liability on the part of those agencies. Brian's mother claimed that the school district was liable because it created a danger when the district left Brian and his assailant alone and unsupervised. The court found that this allegation was just another way of attempting to create a custodial relationship and thus rejected that theory.

The Eighth Circuit noted its disagreement with the courts who permit liability even where the state acts to render a person more vulnerable to the risk of private violence. Making "such a ruling would make § 1983 virtually co-terminus with traditional tort law, the very expansion of constitutional tort liability that the Supreme Court has rejected" in its prior cases (*referencing Collins v. City of Harker Heights*, 503 U.S. 115, 122, 112 S. Ct. 161, 1067 (1992); *DeShaney v. Winnebago*

County Dep't. of Soc. Servs., 489 U.S. 189, 109 S. Ct. 998 (1989); *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986); *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553 (1980)).

c. *D.R. v. Middlebucks Area Voc. Tech. Sch.*, 972, F.2d. 1364 (3rd Cir. 1992)

Several high school females, one of whom was physically disabled, were sexually molested in their graphics class bathroom and dark room by male students who allegedly had known behavioral problems. The assaults took place during times when the teacher left the classroom unattended. The students sued the school district and school district employees under a § 1983 due process claim and state law. The disabled student also sued for a violation of the EHA (predecessor to the IDEA) arguing in effect that the district's placement of the behaviorally troubled students in her classroom denied her FAPE. The District Court dismissed the EHA claim for failure to state a cause of action. (See district court opinion at 17 EHLR 505.)

In holding that compulsory attendance laws and loco parentis status do not create a special relationship, the Third Circuit distinguished the complete and involuntary restraint existent in the cases of prisoners and the involuntarily committed mental patients from the ability of a student to return home after school where she has access to sources of help and support. The Court further noted that "[i]n the case of special education students, the parents have even greater involvement since they must approve the precise educational program developed for their child."

Plaintiffs also argued the second exception to *DeShaney*. They complained that the school defendants increased their children's risk of harm by failing to report to them regarding the misconduct that resulted in the abuse, placing the class under the control of an inadequately trained and supervised student teacher, failing to demand proper conduct of the student defendants, and failing to investigate and terminate the physical and sexual misconduct. They asserted that the above acts created a climate which facilitated sexual and physical abuse of students. The court held that the plaintiff's allegations were insufficient to show that the school defendants created the danger, increased the danger, or made the students more vulnerable to the danger. After a review of post-*DeShaney* cases in which state-created danger was implicated, the court stated that liability under the state-created danger theory must be based on affirmative acts by the defendants and the harm must be from a foreseeable risk. Moreover, the court held that a violation of a state law duty such as compulsory attendance, by itself, is not sufficient to state a § 1983 claim under the state-created danger theory.

d. *Walton Ex Rel. Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995)

Walton involved an 18 year old hearing impaired student who attended a residential state school for the deaf. After being sexually assaulted by a fellow classmate on two different occasions, his parents brought a § 1983 action against the superintendent of the school for failure to protect him from the assault. The court reviewed the *DeShaney* opinion and the cases in which a constitutional duty was imposed upon the state to provide care to persons who were in the custody of the state. The court focused on the language in *DeShaney* and subsequent cases, finding that a special relationship only existed when the individual was in state custody. The Fifth Circuit concluded that Walton was in the residential placement voluntarily and hence did not come within the scope of the exception carved out for a successful claims and no special relationship existed which would support a substantive due process claim against harm inflicted by a non-state actor.

e. *Stevens v. Umsted,* 131 F.3d 697(7th Cir. 1997)

Bradley Stevens, a blind and developmentally disabled child, attended the Illinois School for visually impaired at the time that he was repeatedly sexually assaulted by other students at the school. His father brought a § 1983 action for damages against the superintendent of the school. The father asserted that the superintendent violated Bradley's constitutional rights to bodily integrity by failing to protect him from the assaults even after he had actual knowledge that assaults had taken place. The court reviewed *DeShaney* and subsequent cases in which courts decided that circumstances were sufficiently similar to incarceration and institutionalization to find that a constitutional duty existed to protect a person from non-state actors. Those cases involved the removal of a child from the home and placement in state custody. The plaintiff argued that a child attending a state residential school was in a similar position to those children who had been placed in foster homes. The court rejected that argument, stating that the student was not taken into custody by the state, but was voluntarily placed at the school by the parents. The Seventh Circuit distinguished a prior Seventh Circuit case, *Camp v. Gregory*, 67 F.3d, 1286 (7th Cir. 1995), stating that in the present case, the legal guardian remained the child's parents whereas in *Camp*, the legal guardian voluntarily relinquished rights to the child. Because the Seventh Circuit found that Bradley was not in state custody, it held that no facts existed to support a claim of a state duty to protect Bradley from private actors existed and thus dismissed the claim.

The Seventh Circuit also found the plaintiff's state-created danger theory without merit. The facts pled by the plaintiff involved the defendant's failure to act. The court held that the plaintiff must plead some affirmative act on the part of the state that created the danger or rendered Bradley more vulnerable to an existing danger. The Court noted, however, that the only issue before it was whether or not the principal had a constitutional duty to protect the student, not whether there was any remedy available for the harm he endured.

f. *Sutton v. Utah State Sch. for the Deaf and Blind,* 30 IDELR 12 (10th Cir. Mar. 1, 1999)

A student with cerebral palsy, mental retardation, blindness and a speech impairment was molested in the restroom of the state school he attended. The parents notified officials who agreed to ensure that student would be monitored at all times while in the restroom. However, approximately one week later, a teacher's aide caught a classmate sexually molesting the student again. The parents sued the school district, the principal and various other individuals under § 1983 and state law causes of action. The state school argued that Eleventh Amendment immunity barred the parents' suit. The Tenth Circuit held that by removing the suit to federal court, the defendants unequivocally waived their Eleventh Amendment immunity. Under the state-created danger theory, the plaintiff argued that the school principal created the danger by placing the child in harm's way. Secondly, the plaintiff claimed that because the principal failed to adopt a protective policy and inadequately informed and trained school employees, he enhanced the danger of sexual assault to the child. The Tenth Circuit affirmed the dismissal of the first argument but reversed dismissal of the second argument. The Court dismissed the first argument because it found that the principal did not undertake an affirmative action to place the child in harm's way. Because liability under the due process clause may not be based on negligent action, the principal's conduct did not rise to the requisite level of culpability. The Court held that inadequate training may serve as a basis for a § 1983 claim. Thus, it did not dismiss the second cause of action finding that the principal's failure to train amounted to deliberate indifference to the rights of persons with whom his subordinates came in contact.

g. *Murrell v. School District No. 1*, 186 F.3d 1238 (10th Cir. 1999)

In *Murrell*, the parent of a student with spastic cerebral palsy filed suit under Title IX and other causes of action against the school district, the board of education, the principal of the high school, the teacher, the superintendent and other individuals when her daughter was sexually assaulted at school. The person who allegedly committed the assault was another special education student known to have significant disciplinary and behavioral problems. The teachers were aware that the male special education student had engaged in aggressive and sexually inappropriate conduct toward the plaintiff's daughter. Although the teachers became aware of the male student's initial assault on the student, they did not inform the parent and they told the student not to tell her mother. When the parents met with the principal, the principal suggested that the sexual contact may have been consensual even though the female student was legally incapable of consenting. The *Murrell* court cited *Davis* and analyzed the case according to the *Davis* standards. The Tenth Circuit broke down the *Davis* test into four factors that a plaintiff must allege to prevail under Title IX theory. (1) the plaintiff must show that the District had actual knowledge of or (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to educational benefits or opportunities provided by the school. The fact that the principal had the ability to suspend students for behavior which is detrimental to the welfare, safety and morals of other students, that neither the principal nor teacher ever appropriately disciplined the assailant, and that they actively participated in concealing the facts of the assault from the parents demonstrated to the court that the school district had acted in a deliberately indifferent manner toward the harassment.

h. *Spivey Ex Rel. v. Elliot*, 41 F.3d 1497 (11th Cir. 1995)

Spivey involved an 8-year old student with a hearing impairment who was sexually assaulted by a fellow classmate at a state residential school for the deaf. The child's parents sued school officials under a § 1983 claim asserting that the school had a constitutional duty to protect the child from assault by fellow classmates. Foregoing any discussion relating to special relationship or state-created danger theories, the Eleventh Circuit directly addressed whether the school officials correctly asserted qualified immunity as a bar to suit. In dismissing the case, the court held that the defendants were entitled to qualified immunity because no constitutional right was clearly established at the time of the sexual assault.

i. *Maxwell v. School Dist. of the City of Philadelphia*, 30 IDELR 532 (D.C.P.A. May 18, 1999)

A female middle school student with a learning disability was assaulted and raped by another special education student on the floor in the classroom behind a blackboard. In analyzing the state-created danger doctrine, the district court employed a four-part test enunciated in *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902 (3d Cir. 1997)(see *infra*). Under that test, liability attaches if (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. The facts reveal that the student teacher was in the classroom the entire time that the assault took place. Apparently, the teacher failed to manage the classroom environment which resulted in chaos. The student teacher knew what was happening as students moved furniture and assaulted other students, but did nothing in response. At one point, she announced that she didn't care what the students did as long as they didn't bother her. In applying these facts to the four-part test, the district court found that plaintiffs successfully articulated sufficient facts to assert a § 1983 claim under the state-created danger theory.

j. *Estes v. Chicago Board of Education*, 28 IDELR 971 (N.D. Ill. Aug. 13, 1998)

A female student enrolled in a special education program was sexually assaulted by a group of special education students, one of whom was allowed to be in the classroom by the substitute teacher although not assigned to that classroom. The federal district court dismissed the state law claims on the basis of state law immunity. An Illinois statute immunizes the school district from liability for failure to detect and prevent crimes including assaults by other students. The student's § 1983 claim was also dismissed for failure to demonstrate that a state-created danger existed.

k. *McMahan v. Crutchfield*, 25 IDELR 299 (Wash. Jan. 17, 1997)

In *McMahan*, a woman whose daughter was physically assaulted by a 21-year-old student with mental retardation filed suit against a public school district and a college based on state tort law under a premise liability theory and under a claim for negligent supervision. The 21-year-old student participated in transition program of job training through the public school district and was assigned as a kitchen helper at a college cafeteria under the supervision of college employees. The student had a history of behavior problems, including a sexual assault charge. Some question existed as to the degree to which this information was transmitted to the college. The school district admitted liability and settled their portion of the case. The college went to trial and the jury awarded the parent over $1,000,000 in damages on the basis of the college's negligence in supervising the student.

I. *Marshall v. Courtland*, 1999 W.L. 978150 (N.Y.A.D. 3 Dep't)

In *Marshall*, the parents of a murdered child sued the school district for negligent supervision. Both the daughter and the perpetrator were special education students enrolled in the senior high school. During the student's lunch period, the alleged assailant took his classmate outside of the school building to a wooded area on the school property and murdered her. New York law holds that schools are under a duty to adequately supervised the students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. However, the school districts are not ensurers of the safety of students. To be foreseeable, a school district must have actual knowledge or constructive notice of similar conduct to that alleged in the instant case. The New York Supreme Court held that the plaintiffs submitted insufficient evidence to create a fact issue as to whether the assailant's past behavior put the defendant on notice that he was dangerous and needed counseling and monitoring. Moreover, the court rejected the plaintiff's claims that the wooded area was inherently dangerous and gave rise to a duty to provide additional supervision.

K. OTHER CASES RELEVANT TO LIABILITY ISSUES

1. *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267 (7th Cir.1990)

J.O. involved the sexual molestation by a teacher of several children in his classroom. The parents sued the school district, the school board members, the superintendent, and the principal under § 1983, but did not sue the teacher. Additionally, the parents sued the same defendants and the teacher under state tort law. At issue was whether the parents' claims of child molestation rose to the level of deprivation of a constitutionally protected liberty interest on the basis of a special relationship between the school defendants and the school children. The plaintiffs did not assert that any school policies of the district provided a climate in which the students were more vulnerable to molestation. Instead, they argued that a special relationship existed which imposed an affirmative duty to provide for the children's safety. In analyzing *DeShaney*, the Seventh Circuit said that the state's custody over the person is the most distinguishing characteristic in the cases in which a special relationship has been found. The court held that compulsory school attendance does not create that special relationship, because the parents retain primary responsibility for the child and parents retain substantial freedom to act.

2. *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992)

Maldonado involved the parents' claim for wrongful death from strangulation in the school cloakroom adjacent to the grade school classroom. The parents assert that the child's death occurred as a direct result of the teacher's failure to supervise her students and the superintendent and principal's deliberate indifference to the training and supervision of their teachers. The parents asserted this claim under § 1983. The district court granted summary judgment to all the defendants because the plaintiff did not show that the need for more or different training was such that a violation of a constitutional right occurred. Thus, all defendants were protected on the basis of qualified immunity. The parents appealed the teacher's liability asserting that qualified immunity was improper because the law was clearly established at the time of the incident. The Tenth Circuit reviewed whether the due process clause was implicated under the theory of a special relationship between the teacher and student. The Tenth Circuit held that the compulsory attendance laws did not create an affirmative constitutional duty to protect students under the theory of special relationship after a review of *DeShaney* and cases from the Third and Seventh Circuits that reached a similar conclusion.

3. *Russell Ex Rel. Russell v. Fannin County School District*, 784 F.Supp. 1576 (N.D. Ga. 1992), *aff'd* 981 F.2d. 1263 (11th Cir. 1992)

A high school student was hit several times on the head in the hallway between classes by another student. His parents sued the school district, the board of education, the superintendent and the high school principal for damages and other relief under § 1983 and under state tort law claim for negligent supervision. The plaintiffs argued that the ineffective customs and policies of the district failed to adequately protect their son against an assault by another student. The district court stated that the student who committed the assault was a private actor and that *DeShaney* stands for the harsh proposition that even when state officials know that a person is in danger of imminent harm from a third party, the due process clause does not impose a duty upon the state actors to prevent the harm. The court recognized that if a special relationship existed, such as in cases where the state places the person in its custody, then the state's failure to protect the person may constitute a constitutional violation. The court held that no special relationship was created by the fact that Georgia has a compulsory school attendance law because a high school student is still able to care for his basic human needs and his parents retain primary responsibility for his care.

4. *Pagano v. Ex Rel. Pagano v. Massapequa Public Schools*, 714 F.Supp. 641 (E.D.N.Y. 1989)

In *Pagano*, an elementary school student brought a § 1983 action against school officials to recover for the failure to prevent continuing attacks and abuse by other students. At the time of the attacks, the plaintiff was a fifth grade students at one of the district's elementary schools. His complaint alleged that he was the victim of a total of 17 assaults or attacks and that the school district and individual defendants were aware of the attacks and did not take steps to prevent them. He sued the school district and individual employees under § 1983 asserting that they violated his constitutional right to bodily integrity and thus deprived of safe access to public schooling. The defendants argued that no special relationship existed between the defendant and the plaintiff that would give rise to a duty to protect him from the assaults. The court noted that § 1983 claims generally do not apply to merely negligent deprivations of constitutional rights, however, because the plaintiff complained of multiple incidents, the court found that such conduct may rise to the level of deliberate indifference, such that the court did not grant the motion to dismiss the plaintiff's claim. In so doing, the district court relied on a pre-*DeShaney* Second Circuit case in which the Second Circuit held that a special relationship existed thus creating a duty in cases where a child has been removed from his parental home and placed in a foster home situation. The district court found that this case was more analogous to the present set of circumstances than *DeShaney* because the student and the perpetrator were under the care of the school in its *parens patriae* capacity at the time that the incidents occurred.

5. *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994)

A high school student was killed when he was hit in the head by a stray bullet shot by a non-student in the hallway of his public high school. The parents filed a § 1983 action as well as state law claims against the school district and the principal. The district court dismissed all claims. The Fifth Circuit stated that the key to state-created danger cases is the state actors' culpable knowledge and conduct which affirmatively places an individual in a position of danger. The Fifth Circuit established a three-part analysis in determining whether a state-created danger exists: (1) The environment created by the state actors must be dangerous; (2) they must know it is dangerous; and to be liable (3) they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. At the very least, the defendant must have been deliberately indifferent to the plight of the plaintiff. In examining the facts of the case in light of the three-step test, the Fifth Circuit found that although the district may have been negligent, they were not deliberately indifferent. First, the presence of numerous trained adults on the school campus rendered the campus less dangerous than the high crime neighborhoods in other cases where liability has been found. Second, the school officials had no actual knowledge that a non-student invader would enter the campus and fire a pistol randomly at students. Third, the Fifth Circuit found that the plaintiff did not plead that the school officials placed the student in such a dangerous environment that he was unable to defend himself or access sources of aide. There was no sufficiently culpable affirmative act on the part of the school district to render it liable for the student's death.

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The Family Educational Rights and Privacy Act

"problems in day-to-day school operations"

Presented by:

Deryl W. Wynn
October 12-14, 2000
NSBA Council of School Attorneys

About the materials: The materials are divided into five Parts. Part I contains a review of selected 2000 amendments to 34 C.F.R. Part 99, The Family Educational Rights and Privacy Act. The items discussed were selected based on their relevancy to elementary and secondary schools. Part II contains an arbitrary selection of queries posed to the author over the past two years. These questions were posed by teachers and school administrators. The answers were derived from several sources. Part III focuses on issues of interest to school attorneys. Some of the topics were taken directly from the COSA service. Part IV discusses FERPA within the context of special education. Part V is an appendices containing forms, charts, and resources which may be helpful to the school law practitioner.

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PART I

Family Educational Rights and Privacy Act
Review of Selected 2000 Amendments to 34 C.F.R. Part 99

REGULATION	OLD	NEW	DEPARTMENT COMMENTS
34 C.F.R. 99.3(b) **What definitions apply to these regulations?**	"*Directory information*" means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended.	***Directory information*** means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (*e.g.*, undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended. **Dates of attendance**. (a) The term means the period of time during which a student attends or attended an educational agency or institution. Example of dates of attendance include an academic year, a spring semester, or a first quarter. (b) The term does not include specific daily records of a student's attendance at an educational agency or institution.	We do not believe that the disclosure of student e-mail addresses will generally be considered harmful or an invasion of privacy. We think that a student's e-mail address is analogous to a student's mailing address, an item already included as directory information. The Department also has concluded that a student's photograph is a type of identifying information, like a name and address, that would generally not be harmful or an invasion of privacy if disclosed. Unlike social security numbers (SSNs), we do not believe that disclosure of photographs will allow access to other types of sensitive information such as disciplinary files or grades. For parents or eligible students who do not wish to have institutions disclose photographs or any other category of directory, FERPA affords them with an additional protection. FERPA requires schools to provide parents and eligible students with an opportunity to opt out of disclosing "directory information." We will reevaluate our previous advice that defined (class rosters and schedules)as "directory information: and further

REGULATION	OLD	NEW	DEPARTMENT COMMENTS
			consider the concerns raised by commenters about student safety. In particular, we are concerned that the inclusion of class rosters and class schedules may lead schools to disclose sensitive information. For instance, we believe a school's disclosure of the class schedule of a student enrolled in a special education or remedial calls would be harmful or an invasion of privacy. Additionally, many class rosters include students' SSNs or other identification numbers; a disclosure of this information, even if class roster were designated as directory information, would be a violation of FERPA.

REGULATION	OLD	NEW	DEPARTMENT COMMENTS
34 C.F.R. 99.3(b)(1) **What definitions apply to these regulations?**	**(b) The term [Educational records] does not include:** (1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;	**(b) The term [Educational records] does not include:** (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.	The main purpose of this exception to the definition of "education records" is to allow school officials to keep personal notes private. For example, a teacher or counselor who observes a student and takes a note to remind himself or herself of the student's behavior has created a sole possession record, so long as he or she does not share the note with anyone else.
34 C.F.R. 99.31(a)(9)(iii) **Under what conditions is prior consent not required to disclose information?**	(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions: (9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena. (iii) If the educational agency or institution initiates legal action against a parent or student and has complied with paragraph (a)(9)(ii) of this section, it may disclose the student's education records that are relevant to the action to the court without a court order or subpoena.	(a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by §99.30 if the disclosure meets one or more of the following conditions: (9)(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff. (B) If a parent of eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's	When an educational agency or institution files a lawsuit against a student or parent, the complaint is likely to disclose personally identifiable information from the student's education records. It does not make sense to require that an educational agency or institution inform a parent or student that it plans to disclose personally identifiable information from a student's education records in a complaint because a parent or student cannot do anything to prevent the complaint from being filed. Further, after a complaint has been filed, we do not think that notification of a parent or student is necessary. A parent of student who has been sued by an educational agency or institution should realize that personally identifiable information from the student's education records might be disclosed in the lawsuit. If the parent or student wants to ensure the student's

REGULATION	OLD	NEW	DEPARTMENT COMMENTS
		education records that are relevant for the educational agency or institution to defend itself.	privacy, the parent or student may petition the court to take measures to protect the student's privacy, such as sealing the court's records. For two reasons, we have concluded that an educational agency or institution may disclose education records to a court without consent and without a court order or subpoena if a parent or student has sued the agency or institution. First, an agency or institution should not be required to subpoena its own records or seek a judicial order in order to defend itself in a lawsuit initiated by a parent or student. Second, we believe that when a parent or eligible student sues an agency or institution, the parent or eligible student understands that the agency or institution must be able to defend itself. In order to defend itself, the agency or institution must be able to use relevant education records of the student. Thus, we believe that the parent or eligible student waives their FERPA protections under a theory of implied consent.

REGULATION	OLD	NEW	DEPARTMENT COMMENTS
34 C.F.R. 99.33(c) **What limitations apply to the redisclosure of information?**	(a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. (c) Paragraph (a) of this section does not apply to disclosures made pursuant to court orders or lawfully issued subpoenas under §99.31(a)(9), to disclosures of directory information under §99.31(a)(11), or to disclosures to a parent or student under §99.31(a)(12).	(c) Paragraph (a) of this sections does not apply to disclosures made to parents of dependent students under §99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under §99.31(a)(9), to disclosures of directory information under §99.31(a)(11), to disclosures made to a parent or student under §99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under §99.31(a)(14), or to disclosures made to parents under §99.31(a)(15).	Another commenter asked if a divorced parent might use this process to obtain financial information in the student's record about another parent. The same commenter also asked if the parent who claims the student as a dependent could restrict the kind of information that the institution may disclose to the other parent. Because this provision provides an institution with discretion regarding what information, if any, it disclosed to a parent, we do not believe that institutions will release information to known perpetrators of domestic violence. We strongly encourage victims of domestic violence to inform institutions of postsecondary education not to disclose any information from a student's education record to a perpetrator of domestic violence.

REGULATION	OLD	NEW	DEPARTMENT COMMENTS
34 C.F.R. 99.5 **What are the rights of students?**	(c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance.	(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.	*Discussion*: The amendment clarifies that a student attending an educational institution who applies for admission to a separate component of the institution and is rejected does not have any FERPA rights with respect to records maintained by that separate component of the institution. That student does not have these rights because he or she has not attended that separate component. Similarly, a student who is admitted to a separate component of an institution does not have FERPA rights with respect to the records of that component until he or she enrolls and becomes a student in attendance there. Each institution may determine when a student is in attendance in accordance with its own enrollment procedures.
34 C.F.R. 99.63 **Where are complaints filed?**	A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, Washington, D.C. 20202-4605.	A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., .Washington, D.C. 20202-4605.	**Note**: For full text of Department comments for Part I, See Appendix -A. For remaining provisions of 34 C.F.R., Part 99, See Appendix -B. Appendix -C sets out full text of 20 U.S.C. §1232g.

PART II

Family Educational Rights and Privacy Act
22 Questions frequently asked by teachers and administrators

QUESTION	ANSWER	NOTES
1. What is the Family Educational Rights and Privacy Act?	FERPA is a Federal law which affords parents of students under the age of 18 (and students under the age of 18) the right to have access to their children's education records, the right to seek to have the records amended, and the right to have some control over the disclosure of information from the records. **In the matter of Fonda-Fultonville (NY) Cent. Sch.**, 31 IDELR 145 (FPCO 1998).	
2. What is an educational record?	"Education records" are broadly defined as: those records, files, documents, and other materials, which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A): 34 C.F.R. § 99.3. Any record, such as a permanent record card, a student's work, or a teacher's grade book, is an "education record" under FERPA if it is maintained by a school and directly related to a student. A psychological evaluation or assessment would also be an education record under FERPA if it contains information that is "directly related" to the student. **In the matter of Fonda-Fultonville (NY) Cent. Sch.**, 31 IDELR 145 (FPCO 1998). Generally, any record that contains personally identifiable information,	

QUESTION	ANSWER	NOTES
	such as name, student identification number, or other information which would link the document to the individual, is an education record under FERPA. Id. However, test protocols or test question booklets which do not contain information directly related to the student are not education records under FERPA. Id.	
3. What documents are not considered educational records?	The following records are not educational records under FERPA: (1)Test protocols or test question booklets which do not contain information directly related to the student; (2)Records that are kept in the sole possession of administrative, supervisory, or instructional personnel, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record; (3) Records pertaining to a student's employment if you employ the student; (4) Records kept by a law enforcement unit of the school district if those records meet certain criteria; and (5) Records that only contain information about a student after he or she is no longer a student in the district. 20 U.S.C. § 1232 g(a)(4)(B).	

QUESTION	ANSWER	NOTES
4. If the parents are divorced, which parent is entitled to exercise rights under FERPA?	Absent a judicial order, state statute or other legally binding document to the contrary, both parents may exercise the rights provided under FERPA. However, school officials should remain mindful of the potential for divorced parents to abuse the law by utilizing educational records to acquire financial and other personal information relating to a former spouse. In particular, school officials should be especially sensitive to such requests so as to avoid the release of such information to known perpetrators of domestic violence. Accordingly, school officials should strongly encourage victims of domestic violence to inform them not to disclose any information from a student's education record to a perpetrator of domestic violence. See 34 C.F.R. § § 99.3 and 99.31; Vol 65 Federal Register 41857 (July 6, 2000); (See also Appendix - D).	
5. At various awards ceremonies, we recognize student achievements. Sometimes, just to demonstrate the abilities of our disabled students, we refer to them as special education students. Should we get parental permission prior to making such references?	Yes, because the identification of the student as a recipient of special education services discloses personally identifiable information from the student's records. An opinion issued by the United States Family Policy Compliance Office ("FPCO")(the agency responsible for the administration of FERPA) illustrates the point. In **School (ME) Administrative Dist. #75**, 31 IDELR 221 (FPCO 1998), the parents of an eighth-grade student with a disability filed a complaint with the FPCO charging that the student's teacher violated the Family Education Rights and Privacy Act by using disparaging comments toward the student. The parent claimed that the teacher, frustrated by the student's behavior, said, "I don't care if he is	

QUESTION	ANSWER	NOTES
	disabled . . . it's his problem and not mine, and I don't have to deal with it." Classmates of the disabled student overheard this remark. In ruling for the parent, the FPCO Director determined that the teacher's comments violated FERPA, since by revealing the disability to the class the teacher disclosed personally identifiable information from the student's education records. Id. As a result, the district was directed to provide assurances that all school officials and the teacher were informed of the disclosure requirements of FERPA.	
6. May school officials grant outside agencies access to educational records without parental consent?	It depends. FERPA generally requires that prior written consent of the student or parent be obtained before personally identifiable information in education records can be released, with some exceptions. One valid exception which would not require consent occurs in situations where the disclosure is to officials who have "legitimate educational interests." **Letter to Garvin**, 30 IDELR 541 (OSEP 1998); 20 U.S.C. § 1232g (b)(1)(A); 34 C.F.R. § 99.31(a)(1). Educational agencies must include a specification of the criteria which is used to make this determination in its annual notification of FERPA compliance, and educational agencies may disclose education records to individuals who meet this criteria. Id. The FPCO has interpreted individuals with legitimate educational interests to include those school officials who are performing an official task for the educational agency or institution which requires access to the	

QUESTION	ANSWER	NOTES
	information contained in the records. Garvin, supra. The privacy protections of FERPA also extend to others who act on behalf of an educational agency or institution, including independent contractors and FERPA's consent requirement does not prohibit the educational agency or institution from disseminating education records to outside persons who perform professional and business services for the school. Id. Note: This analysis should be distinguished from the circumstances related in **In the Matter of the North Kansas City (Mo) Sch. Dist.**, 31 IDELR 119 (FPCO 1998). In that matter, a very different result occurred when a paraprofessional in a student's self-contained behavior disorder classroom, disclosed the diagnosis of his disability and the type of medication he was using to the student's scout leader. The paraprofessional also told the scout leader about the student's aggressive behavior in the classroom. There was no evidence of ill-motive on the part of the paraprofessional. In finding for the parent, the Director of FPCO concluded that the district had improperly disclosed information from education records without the parent's prior written consent in violation of FERPA. Thus, even well-intentioned disclosures, absent a legitimate educational interest, are prohibited.	

QUESTION	ANSWER	NOTES
7. Is FERPA violated when a teacher permits, without parental permission, students to grade one anothers' papers in class and the announcing of such grades to the class?	Probably, especially if the identity of the student's whose paper is being graded is known. **Falvo v. Owasso Indep. School Dist**., 20 F.3d. 1200 (10th Cir. 2000). In Falvo, a parent learned that a number of her children's teachers would sometimes have their students grade one another's work assignments and tests and then would have the students call out their own grades to the teacher. The parent complained to school officials claiming that the practice "severely embarrassed her children by allowing other students to learn their grades."Although the parent was told that her children always had the option of confidentially reporting their grades to the teacher, the School District refused to disallow the grading practice. Subsequently, the parent filed suit claiming that the school's practice violated FERPA. The Tenth Circuit agreed with the parent and rejected the analysis of the FPCO which had earlier permitted the practice of student graders. According to the Falvo Court, "FERPA prohibits educational agencies or institutions from maintaining "a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents" to anyone other than statutorily designated authorities or individuals, which does not include other students. 20 U.S.C. § 1232g(b)(1). FERPA defines "education records" as "those records, files, documents, and other materials which-(i) contain	

QUESTION	ANSWER	NOTES
	information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." Id. § 1232g(a)(4)(A). Based on this analysis, the Falvo court reasoned that "based purely on the language of the statute itself, . . . the grades which students record on one another's homework and test papers and then report to the teacher constitute "education records" under FERPA provided that these grades are also maintained by a person acting for [an educational] agency or institution. The Court wasted no time in finding the educational records in **Falvo** were maintained by a person acting for an educational agency or institution since some grades which students gave one another and reported to the teacher were recorded in the teacher's grade book. According to the Court, when the grades were placed in the teacher's grade book, they were "maintained ... by a person acting for [an educational] agency or institution." The Court rejected the contention of school officials who argued that FERPA itself states that, "the term 'education records' does not include-(I) records of instructional ... personnel(grade books)... which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute...." § 1232g(a)(4)(B)(i). In its rejection, the Court held that the exception cited only applies when those grade books	

QUESTION	ANSWER	NOTES
	"are not ... revealed to any other person except a substitute." The Falvo court further held that FERPA's statutory language did not reflect a Congressional intent that the term "education records" was to be read broadly so as to include any form or process relating to grade books. Rather, it merely sought to create a narrow exception to allow teachers to disclose their grade books to substitutes. **Falvo**, 220 F.3d at 1210-1211.	
8. May we send a student's records to another school district or college where the student is seeking to enroll without prior written consent?	Yes, but your policy must indicate that you may do this. You must also either have a statement in your policy indicating you will forward educational records to other educational institutions or make a reasonable attempt to notify the parent or student that the record has been forwarded	
9. May we disclose personally identifiable student records to the U.S. Department of Education or a State Department of Education without parent consent?	Generally, yes. These officials may have access to education records in connection with an audit or evaluation of federal or state supported education programs, or for the enforcement of or compliance with federal legal requirements which relates to those programs. 34 C.F.R. §99.35. See also Appendix- E which illustrates this point within the context of Title - I.	
10. What about health or safety emergencies?	You may disclose personally identifiable information from an education record without prior consent to appropriate parties in connection with an emergency if the information is necessary to protect the health or safety of the student or other individuals. 34 C.F.R. §99.36.	
11. Can personally identifiable information be disclosed within the	Yes. FERPA allows the inclusion in the student's educational record	

QUESTION	ANSWER	NOTES
educational environment that includes disciplinary action taken against a student? 11a. To whom can this information be released?	appropriate information concerning disciplinary action taken against a student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community 11a. Appropriate information may be released to teachers and school officials within the school (*) who have been determined to have legitimate educational interests in the behavior of the student. *(including teachers and school officials in other schools).	
12. I've been told that we may disclose directory information without prior consent. What is directory information?	Directory information is information contained in educational records which would not generally be considered harmful or an invasion of privacy if disclosed. Name, address, telephone number, e-mail addresses, photographs, date of birth, place of birth, major field of study, participation in school activities or athletics, weight and height of athletic participants, dates of attendance, and the most recent previous educational institution attended are examples of directory information listed in the regulations. 34 C.F.R. §99.3	
13. Do we always have authority to release directory information without prior consent?	No. Your policy must permit such disclosure and you must give parents and students annual notice of: (1) The types of information you designate as directory information (2) Their right to refuse to let such information, or any part of it, be released; and (3) The time period within which they must notify you in	

QUESTION	ANSWER	NOTES
	writing that they do not want any or all of this information released. 34 C.F.R. §99.37.	
14. May we disclose records without consent if they are subpoenaed?	Yes, but you must make a reasonable effort to notify the parent or eligible student in advance of complying with the subpoena or judicial order. 34 C.F.R. §99.31(a)(9).	
15. When a student turns 18, do we need the student's consent to provide his parents with educational records?	Maybe. If the student is still a dependent of the parent for tax purposes, you are not required to have prior consent of the student to disclose the record to his parents. If the student is independent, however, consent would be required. 34 C.F.R. §99.31(a)(8).	
16. What are the FERPA restrictions on matching data from student information files with data from other agency files?*	FERPA generally prohibits data matches without parent consent except to (1) officials in other schools or school systems where a student intends to enroll; (2) authorized state or federal education representatives; and (3) organizations that are conducting approved studies on behalf of an education agency. Under certain circumstances, school officials can make cooperative data sharing arrangements, but they cannot reveal personally identifiable information.	
17. Can I use social security numbers to identify or match education records?*	Yes, you may use social security numbers if your state has no prohibition against using them. However, you may not require students to provide them. It is important for you to inform students or parents if agencies or schools intend to use these numbers.	
18. If a student's record is corrected at the district level, must the district inform other holders of	Yes. This is a major part of the importance of a written policy regarding what data are maintained	

QUESTION	ANSWER	NOTES
that record?*	and where they are kept.	
19. If some student data are protected and others are not, must I keep separate sets of records on students?*	No, you are not required to keep separate sets. However, it is good practice and would facilitate monitoring access to the records.	
20. Absent parental consent, a Court order or subpoena, does FERPA require school officials to provide educational records to the Immigration and Naturalization Service?*	No. FERPA makes no such request and in most instances absent an emergency would prohibit such disclosures. Note: One child advocacy group takes a harsher position. See Appendix - F. Appendix - F reflects the opinion of the National Coalition of Advocates for Students with respect to the use of social security numbers as a device for student identification. For further analysis on this subject, see Section 7(a) of the Privacy Act of 1974 which makes it unlawful for a governmental agency to deny an individual any right, privilege or benefit provided by law because the individual refused to disclose his social security number.	
21. Should parental or eligible student consent to disclosure of educational records be in writing?	Yes. 34 C.F.R. § 99.30(a) provides that such consent should be in writing, state the purpose of the disclosure and identify to whom the disclosure is made.	
22. Are private schools subject to FERPA?	Yes, if the school direct federal funds. This includes funds under Title I, Safe and Drug Free Schools funds, Bilingual Education funds or funds under the Goals 2000 - Educate America Act, to name a few.	
*** Excerpted from Protecting the Privacy of Students: Guidelines for Education Agencies, National Center for Education Statistics, Washington D.C., 1997**		

PART III

Family Educational Rights and Privacy Act
10 Thorny Issues for the School Attorney

QUESTION/TOPIC	ANSWER	NOTES
NOTE: The following discussion occurred on the COSA service between 8-3 and 8-5, 2000. **1. Conflict of laws:** My question deals with an apparent conflict between the privacy requirements of FERPA and a state law that requires the reporting of information about a student that is protected by this federal law. The state's law provides for expulsion or suspension of students found possessing weapons or drugs. The law imposes on the school district the duty to report certain types of student expulsions/suspensions to the state division of motor vehicles, and include in the report the name, address, date of birth, driver's license number, and reason(s) for the expulsion or suspension. The division of motor vehicles is required to suspend the student's driver's license for one year. This reporting requirement does not clearly fit within any of the exceptions listed in	**Response A:** FERPA only covers student education records, it does not cover the knowledge of school officials which does not come from school records. Thus, school officials with knowledge of the weapon/drug possession based not on education records but rather on such things as firsthand perceptions (i.e., personally taking the contraband off a student), witness interviews, information from law enforcement, etc., are not prohibited by FERPA from passing that knowledge on to the state division of motor vehicles. **Response B:** Florida has had a similar law in place for several years. Initially, several of my colleagues and I shared your concerns. We have recently been advised by Michael Olenick, Esq.., who is General Counsel to the Florida Commissioner of Education and the Florida Department of Education that current Florida law does not conflict with FERPA on account of the "juvenile justice" amendment to FERPA. I believe that the Department of Education has reviewed its position with the U.S. DOE, Family Policy Compliance Office and determined that current Florida law does not offend FERPA. The Florida law may be found at Fla. Stat. 322.091. Also, the Florida Department of Education has issued a technical assistance paper 1999-12 which may be obtained by calling Mary Jo	

QUESTION/TOPIC	ANSWER	NOTES
FERPA allowing disclosure w/o parental consent. Does your state have a similar law(s), and if so, how have you addressed this issue? Assuming the state law and FERPA are in conflict, is there a safe course for the school district to follow?	Butler at 850-488-6726 or Kathy Peck at 850-487-2280. At any rate, all Florida school districts under threat of penalty of sanctions by the Florida Legislature are now reporting. **Response C:** FERPA has been amended so that the term 'education records' does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." As a result, district security guards are free to report perpetrators of campus crimes provided the records were created by them, for law enforcement purposes and are maintained by the law enforcement unit. Since the district's security or law enforcement unit is generally involved where possession of weapons and/or drugs are involved, the law enforcement unit can report to the DMV with impunity from the records it maintains. (See Between a Rock and a Hard Place, Law for School Administrators page 135-136.) **Author's Note:** See 20 U.S.C. §1232g(b)(1)(E) and **Morgan v. Chris L.**, 25 IDELR 227 (6th Cir. 1997)	
2. **Model FERPA Notice:** Does anyone have a statement used to notify parents of students currently in attendance of their rights under FERPA?	A model statement is attached in Appendix-G. You can obtain another version on the Internet from the U.S. Dept Ed's web site (http://www.ed.gov/offices/OM/fpco/ess.html). Contents of Notice-Under FERPA, parents of students currently in	

QUESTION/TOPIC	ANSWER	NOTES
	attendance, or eligible students currently in attendance, must be notified **annually** of their rights under FERPA. The notice must inform parents or eligible students that they have the right to – (1) Inspect and review the student's education records; (2) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights; (3) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent; and (4) File with the Department a complaint under concerning alleged failures by the school to comply with the requirements of FERPA. The notice must include all of the following: (1) The procedure for exercising the right to inspect and review education records; (2) The procedure for requesting amendment of records; (3) If the school has a policy	

QUESTION/TOPIC	ANSWER	NOTES
	of disclosing education records to other school officials, a specification of criterial for determining who constitutes a school official and what constitutes a legitimate educational interest. 34. C.F.R. §99.7.	
3. Attorney invoices. Are the billing statements of a private attorney hired by the School District subject to FERPA?	Yes, and the improper disclosure of such invoices containing personally identifiable information may render a school district in violation of the law. **Letter to Howey**, 17 EHLR 701 (FPCO 1991). 34 C.F.R. §99.3 defines the term "education records" as those records that are (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for the educational agency or institution. As a party acting for the educational agency, the district's law firm is required to protect the confidentiality of personally identifiable information on students in accordance with the requirements of FERPA. Id. Therefore, any copy of an invoice for legal services that personally identifies a student is an "education record" subject to FERPA and can only be disclosed in accordance with the confidentiality provisions of FERPA. Id. This is true in the case of the copies of such invoices that are maintained by the law firm and of the copies that are maintained by the district as well.Id.	
4. Records relating to teachers. Does FERPA protect disclosure of the records of teachers who have been disciplined?	No. FERPA protects student records, not teacher records. **See Klein Independent Sch. Dist. v. Mattox**, 830 F.2d 576 (5th Cir.1987), cert. denied, 485 U.S. 1008, 108 S.Ct. 1473, 99 L.Ed.2d	

QUESTION/TOPIC	ANSWER	NOTES
	702 (1988).	
5. School investigation notes. May notes taken by a school psychologist as part of a school investigation into allegations of abuse by a teacher be shielded from parents under FERPA's "sole possession" exception?	It depends. An example of the dilemma facing school officials is reflected in **Parents against Abuse in Schools v. Williamsport Area School District**, 594 A.2d 796 (Pa. 1991). In this case, a parents' association and a number of individual parents of fourth graders who suffered physical and emotional abuse at the hands of their teacher sought to discover the precise nature of the abuse. To do this, the parents consented to the school district's request to permit one of its psychologists, to interview their children. The parents conditioned their consent to the interviews upon an agreement between the parents and the school district that any information gathered by the psychologist during the interviews was to be provided to the parents to assist them in obtaining outside professional therapy for their children at the school district's expense. Although the psychologist had compiled notes from the interviews, and the parents gave written authorization for release of the notes, the school district would not supply notes or information of any type to the parents, as required by the agreement. In support of its refusal, school officials cited the "sole possession" exception under FERPA, among other rationale. Id. Under FERPA, records of educational personnel in the sole possession of the maker and not accessible or revealed to any other person are specifically excluded from the definition of educational	

QUESTION/TOPIC	ANSWER	NOTES
	records subject to parental inspection under the act. 20 U.S.C. § 1232 g(a)(4)(B)(i). Id. The school's analysis was rejected by the Court which noted that FERPA excludes from the definition of "education records," to which parents have access, records of a psychologist, only if those records relate to a student who is at least 18 years old or attending a post-secondary educational institution and which are made or used only in connection with providing treatment. 20 U.S.C. § 1232g(a)(4)(B)(iv). According to the Court, the notes in question did not meet either of these two requirements for exclusion from the parents' right of access, because the children were minors attending an elementary school, and the psychologist was not involved in treating the children. Id. Furthermore, this provision of FERPA makes clear that even if the exclusion were to apply, it would not give the psychologist a personal right to preclude all access to the records, but provides that the student would have a right to have the records reviewed by an appropriate professional of the student's choice. **Id.**	
6. BOE's ability to view educational records. Can School Board members view educational records without parental consent?	It depends. FERPA generally requires that a parent consent before an educational agency or institution may disclose personally identifiable information from such records to third parties. However, under 34 C.F.R. § 99.31(a)(1), an educational agency or institution may disclose personally identifiable information without the consent of the parents to other school officials (which may include Board	

QUESTION/TOPIC	ANSWER	NOTES
	members) whom the agency or institution has determined to have legitimate educational interests. Under 34 C.F.R. § 99.6(a)(4), each educational agency or institution must adopt a policy which includes a statement indicating whether it has a policy of disclosing personally identifiable information under 34 C.F.R. § 99.31(a)(1), and, if so, a specification of the criteria for determining which parties are school officials and what the agency or institution considers to be a legitimate educational interest. **Letter to Anonymous**, 18 IDELR 969 (OSEP 1992) (Holding that the determination regarding whether attendance of school board members at IEP meetings would violate FERPA must be made on a case-by-case basis.). See also, Letter to Wagner, EHLR 211:236 (OSEP 1980).	
7. Disclosure of student names. (A twist). Can we disclose the names of special education students to persons other than the parents of those students?	No, see **West Babylon Union Free School District**, EHLR 352:305 (OCR 1986). In **West Babylon**, parents alleged that the District failed to protect the confidentiality of the records of special education students when a parent visited the District's special education office and was allowed to review various documents in her daughter's special education file and the minutes of an administrative meeting which referred to her daughter as well as twenty-three other handicapped students. The students' names had not been deleted. Interestingly, this case was decided under the Section 504 procedural requirements set forth at 34 C.F.R. 104.36. Under that statute's implementing regulation at 34	

QUESTION/TOPIC	ANSWER	NOTES
	C.F.R. 300.572, the confidentiality of information regarding handicapped students must be maintained. By providing a parent a document containing the names and confidential information regarding other handicapped students in the District, school officials violate this requirement and Section 504 at 34 C.F.R. 104.36 as well as FERPA.	
8. Student discipline records. If a school official, as a result of information contained in a school record, knows that a student, who has been disciplined for carrying a weapon, is planning to attend a school-sponsored activity at another high school would FERPA prevent her from notifying school officials at the other high school?	No. FERPA does not prevent educational agencies and institutions from maintaining records related to a disciplinary action taken against a student for behavior that posed a significant risk to the student or others or from disclosing this information to school officials who have been determined to have a legitimate educational interest in the behavior of the student. The statute permits the disclosure of information regarding disciplinary action to school officials in other schools that have a legitimate educational interest in the behavior of the student. 20 U.S.C. 1232g(h); 34 C.F.R. 99.36; Vol. 60. Fed. Register 3467 (January 17, 1995); Vol. 61, Federal Register 59294 (November 21, 1996).	
9. Law enforcement records. Does FERPA require the disclosure of school security force records?	Generally, no. FERPA exempts from the definition of "education records" those records that are created by a law enforcement unit for a law enforcement purpose and maintained by that law enforcement unit, thus allowing educational agencies and institutions to disclose these records publicly without obtaining prior written consent. If a law enforcement unit of an institution creates a record for law	

QUESTION/TOPIC	ANSWER	NOTES
	enforcement purposes and provides a copy of that record to a principal or other school official for use in a disciplinary proceeding that copy is an "education record" subject to FERPA if it is maintained by the principal, or other school official and not the law enforcement unit. The original document created and maintained by the law enforcement unit is not an "education record" and does not become an "education record" merely because it was shared with another component of the institution. 34 C.F.R. § 99.8 Vol. 60 Federal Register 3466-67 (January 17, 1995). Additionally, FERPA does not permit any party, including the institution's own law enforcement unit, that has received information from education records to redisclose that information without the prior consent of the parent or eligible student or in accordance with one of the exceptions listed under 34 C.F.R. §99.31, which includes disclosure in compliance with a judicial order or lawfully issued subpoena. Id. at 3468.	
10. **"Sole possession" exception.** Is the "sole possession" exception lost when a teacher *tells* another teacher about the contents in personal notes?	Yes if the teacher to whom the records are revealed is not a substitute for the teacher who created the record. . Under 34 C.F.R. 99.3(b)(1) this exception is only available when the records are". . . kept in the sole possession of the maker, are used only as a personal memory aid, and . . not accessible or revealed to any other person except a temporary substitute for the maker of the record."	

PART IV

Family Educational Rights and Privacy Act
Selected Special Education Issues

QUESTION/TOPIC	ANSWER	NOTES
1. Does FERPA exempt tape-recorded IEP meetings from the definition of educational records?	No. The tape recording of an IEP meeting retained by a school district is an education record within the meaning of FERPA and is subject to confidentiality and access requirements of 34. C.F.R.300.560-565; those regulations afford parents an opportunity to inspect and review education records maintained by school districts. **Letter to Baugh**, EHLR 211:479 (OSERS 1987)(LEA's attorney improperly advised that it would be permissible to deny a parent access to a tape recording because the agency had requested a due process hearing.)	
2. Does FERPA require school officials to give parents access to test protocols?	FERPA does not require parental access to test protocols. Test protocols that do not contain personally identifiable information are not educational records and are not subject to FERPA; therefore, a school district is not required to allow parents access to inspect and review this information. **Letter to McDonald**, 20 IDELR 1159 (OSEP 1993). According to the FPCO, a school system is not required to provide a parent information that is not personally identifiable to his or her child, and documents such as test instruments and interpretative materials that do not contain the student's name are not considered to be directly related to the student. Id. However, this interpretation does not limit a	

QUESTION/TOPIC	ANSWER	NOTES
	school district's duty to explain these tests to a parent or inform a parent regarding testing instruments that constitute the basis for a child's educational decisions. Id.	
3. Can school officials, without parental consent, disclose educational records to a psychologist which it retains as an expert witness?	Yes, employees of the local education agency have access to educational records without parental consent, so if the expert witness was considered an employee or agent of the LEA, disclosure without parental consent is permissible. **Letter to Presto**, EHLR 213:121 (OSEP 1988).	
4. Can school officials, without parental consent, disclose educational records to private attorneys retained by a school district?	Yes, the Family Educational Rights and Privacy Act (FERPA), which generally requires parent consent before a school district may disclose personally identifiable information from student's records to third parties, does not preclude a school district from disclosing information from a student's education records to outside persons who perform professional services for the district as a part of its operation, including a district's attorney. **Letter to Diehl**, 22 IDELR 734 (OSEP 1995); 34 C.F.R. §99.3(a)(1).	
5. Is IDEA violated when a copy of the IEE report is furnished to a school district without parental consent?	No. According to OSEP, an IDEA violation does not occur under these circumstances. Since the results of the IEE are to be considered when designing the appropriate program for a student and the district needs access to the results in order to consider them. **Letter to Katzerman**, 28 IDELR 310 (OSEP 1997)	
6. May school officials, without	FERPA generally requires that	

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QUESTION/TOPIC	ANSWER	NOTES
parental consent, give outside agencies access to educational records?	prior written consent of the student or parent be obtained before personally identifiable information in education records can be released with some exceptions. **Letter to Garvin**, 30 IDELR 541 (OSEP 1998) One valid exception which would not require consent occurs in situations where the disclosure is to officials who have legitimate educational interests. Id. Educational agencies must include a specification of the criteria which is used to make this determination in its annual notification of FERPA compliance, and educational agencies may disclose education records to individuals who meet this criteria. The FPCO has interpreted individuals with legitimate educational interests to include those school officials who are performing an official task for the educational agency or institution which requires access to the information contained in the records .Id. The privacy protections of FERPA also extend to others who act on behalf of an educational agency or institution, including independent contractors and this consent requirement does not prohibit the educational agency or institution from disseminating education records to outside persons who perform professional and business for the school. Id.	
7. Just to speed things along, when involved in due process, my district has a practice of	No. A school district's practice of immediately forwarding a student's records to a due process	

QUESTION/TOPIC	ANSWER	NOTES
submitting educational records to the Hearing Officer well in advance of the actual hearing. Is this in accord with FERPA?	hearing officer after the hearing officer has been selected is inconsistent with FERPA where no special exceptions apply (such as pursuant to a court order or subpoena). **Letter to Stadler**, 24 IDELR 973 (OSEP 1996). A student's educational records can be disclosed in quasi-judicial proceedings such as due process hearings without the parents' or eligible student's consent; however, such disclosure must occur within the course of a due process hearing during the presentation of the evidence. **Id.**	
8. Are invoices from a law firm represented by the district subject to FERPA?	Yes, and the improper disclosure of such invoices containing personally identifiable information may render a school district in violation of the law. 34 C.F.R. 99.3 defines the term "education records" as those records that are (1) directly related to a student and (2) maintained by an educational agency or institution or by a party acting for the educational agency or institution. As a party acting for the educational agency, the district's law firm is required to protect the confidentiality of personally identifiable information on students in accordance with the requirements of FERPA. Therefore, any copy of an invoice for legal services that personally identifies a student is an "education record" subject to FERPA and can only be disclosed in accordance with the confidentiality provisions of FERPA. This is true in the case of the copies of such invoices that are maintained by the law firm and of the copies that are maintained by the district as well.	

QUESTION/TOPIC	ANSWER	NOTES
9. Does 34 C.F.R. 300.529 which sets out limited circumstances in which school officials can report to law enforcement crimes committed by students with disabilities, create an additional exception under FERPA?	No. Section 300.529 does not authorize school districts to circumvent any of their responsibilities under the Act. It merely clarifies that school districts do have the authority to report crimes by children with disabilities to appropriate authorities and that those State law enforcement and judicial authorities have the ability to exercise their responsibilities regarding the application of Federal and State law to crimes committed by children with disabilities. This section must be interpreted in a manner that is consistent with the requirements of FERPA, and not as an exception to the requirements of that law. In other words, the transmission of special education and disciplinary records under paragraph (b) of this section is permissible only to the extent that such transmission is permitted under FERPA. To interpret or otherwise construe would violate the equal protections rights of children with disabilities to be protected against certain involuntary disclosures to authorities of their confidential educational records to the same extent as their nondisabled peers. To avoid this unconstitutional result, this statutory provision must be read consistent with the disclosures permitted under FERPA for the education records of all children. Vol. 64 Federal Register 12631 (March 12, 1999).	

10. What are common examples of disclosure under FERPA.?	**Greater Hoyt (SD) School Board,** 20 IDELR 105 (FPCO 1993) provides several examples. In this case, the release of school board minutes containing information about a child's IEP, financial data relating to a student's IEP placement, and the costs associated with specific aspects of the student's educational program were deemed to have been improper disclosures under FERPA.	

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PART V. APPENDICES

A. 34 C.F.R. Part 99, Family Educational Rights and Privacy Act, Final Rule (July 6, 2000).

B. 34 C.F.R. Part 99, Family Educational Rights and Privacy Act (1996)

C. TITLE 20 USC §1232g 34 C.F.R. Part 99, Family Educational Rights and Privacy Act

D. Rights of Non-Custodial Parent in the Family Educational Rights and Privacy Act

E. DOE Memorandum regarding the Use of Free and Reduced Price-Lunch Data for Title- I Purposes

F. School Opening Alert

G. Model Notification Rights Under FERPA for Elementary and Secondary Institutions

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

Federal Register

Thursday,
July 6, 2000

Part V

Department of Education

34 CFR Part 99
Family Educational Rights and Privacy; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 99

Family Educational Rights and Privacy

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations implementing the Family Educational Rights and Privacy Act (FERPA). The amendments are needed to implement sections 951 and 952 of the Higher Education Amendments of 1998 (HEA). These amendments permit postsecondary institutions to disclose certain information to the public and to parents of students.

DATES: These regulations are effective August 7, 2000.

FOR FURTHER INFORMATION CONTACT: Ellen Campbell, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202–4605. Telephone (202) 260–3887. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph.

SUPPLEMENTARY INFORMATION: On June 1, 1999, the U.S. Department of Education (the Department or we) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (64 FR 29532). In the preamble to the NPRM, we invited interested persons to submit comments and recommendations, particularly on the proposed regulatory definitions of "crime of violence" and "final results" under § 99.39 and the provisions concerning nonconsensual disclosure of information to parents and guardians under § 99.31(a)(14).

We also proposed the following major changes in the NPRM to incorporate statutory provisions added by the HEA:

- Permit disclosure of education records to authorized representatives of the U.S. Attorney General in specified circumstances.
- Permit non-consensual disclosure of the final results of a disciplinary proceeding against a postsecondary student in specified circumstances.
- Permit non-consensual disclosure to parents and legal guardians of students under the age of 21 of information regarding a student's violation of laws or policies governing the use or possession of alcohol or a controlled substance.

These final regulations have significant changes from those proposed in the NPRM. We have provided more detail regarding the crime of violence provision. Specifically, we have included a list of crimes of violence and non-forcible sex offenses. We have also clarified when results become "final" and what categories of information may be disclosed under this provision. These changes are discussed in more detail in appendix B.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 42 parties submitted comments on the proposed regulations. In appendix B, we analyze and summarize these comments and describe changes to the regulations. We discuss substantive issues under the sections of the regulations to which they pertain. Generally, we do not address technical changes and other suggestions that the law does not authorize us to make.

Paperwork Reduction Act of 1995

These regulations do not contain any information collection requirements.

Assessment of Educational Impact

In the NPRM, we requested comments on whether the proposed regulations would require transmission of information that any other agency or authority of the United States gathers or makes available.

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

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You may also find these regulations, as well as additional information about FERPA, on the following Web site:

http://www.ed.gov/offices/OM/fpco/

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http://www.access.gpo.gov/nara/index.html

(Catalog of Federal Domestic Number does not apply.)

List of Subjects in 34 CFR Part 99

Administrative practice and procedure, Education, Information, Parents, Privacy, Records, Reporting and record-keeping requirements, Students.

Dated: June 28, 2000.

Richard W. Riley,

Secretary of Education.

For the reasons discussed in the preamble and appendix B, the Secretary amends part 99 of title 34 of the Code of Federal Regulations as follows:

PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

1. The authority citation for part 99 continues to read as follows:

Authority: 20 U.S.C. 1232g, unless otherwise noted.

2. Section 99.1 is amended by revising paragraph (a)(2) to read as follows:

§ 99.1 To which educational agencies or institutions do these regulations apply?

(a) * * *

(2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

* * * * *

3. Section 99.3 is amended by adding the definition of "Dates of attendance", revising the definition of "Directory information", and by revising paragraph (b)(1) of the definition of "Education records" to read as follows:

§ 99.3 What definitions apply to these regulations?

* * * * *

Dates of attendance. (a) The term means the period of time during which a student attends or attended an educational agency or institution. Examples of dates of attendance include an academic year, a spring semester, or a first quarter.

(b) The term does not include specific daily records of a student's attendance at an educational agency or institution.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (*e.g.*, undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

* * * * *

Education records.

* * * * *

(b) * * *

(1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

* * * * *

4. Section 99.5 is amended by revising paragraph (c) to read as follows:

§ 99.5 What are the rights of students?

* * * * *

(c) An individual who is or has been a student at an educational institution and who applies for admission at another component of that institution does not have rights under this part with respect to records maintained by that other component, including records maintained in connection with the student's application for admission, unless the student is accepted and attends that other component of the institution.

* * * * *

5. Section 99.31 is amended by revising paragraph (a)(3), revising paragraph (a)(8), revising paragraph (a)(9)(iii), revising paragraph (a)(13), adding new paragraphs (a)(14) and (a)(15), and revising paragraph (b) and the authority citation to read as follows:

§ 99.31 Under what conditions is prior consent not required to disclose information?

(a) * * *

(3) The disclosure is, subject to the requirements of § 99.35, to authorized representatives of—

(i) The Comptroller General of the United States;

(ii) The Attorney General of the United States;

(iii) The Secretary; or

(iv) State and local educational authorities.

* * * * *

(8) The disclosure is to parents, as defined in § 99.3, of a dependent student, as defined in section 152 of the Internal Revenue Code of 1986.

* * * * *

(9) * * *

(iii)(A) If an educational agency or institution initiates legal action against a parent or student, the educational agency or institution may disclose to the court, without a court order or subpoena, the education records of the student that are relevant for the educational agency or institution to proceed with the legal action as plaintiff.

(B) If a parent or eligible student initiates legal action against an educational agency or institution, the educational agency or institution may disclose to the court, without a court order or subpoena, the student's education records that are relevant for the educational agency or institution to defend itself.

* * * * *

(13) The disclosure, subject to the requirements in § 99.39, is to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense. The disclosure may only include the final results of the disciplinary proceeding conducted by the institution of postsecondary education with respect to that alleged crime or offense. The institution may disclose the final results of the disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

(14)(i) The disclosure, subject to the requirements in § 99.39, is in connection with a disciplinary proceeding at an institution of postsecondary education. The institution must not disclose the final results of the disciplinary proceeding unless it determines that—

(A) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(B) With respect to the allegation made against him or her, the student has committed a violation of the institution's rules or policies.

(ii) The institution may not disclose the name of any other student, including a victim or witness, without the prior written consent of the other student.

(iii) This section applies only to disciplinary proceedings in which the final results were reached on or after October 7, 1998.

(15)(i) The disclosure is to a parent of a student at an institution of postsecondary education regarding the student's violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance if—

(A) The institution determines that the student has committed a disciplinary violation with respect to that use or possession; and

(B) The student is under the age of 21 at the time of the disclosure to the parent.

(ii) Paragraph (a)(15) of this section does not supersede any provision of State law that prohibits an institution of postsecondary education from disclosing information.

(b) Paragraph (a) of this section does not forbid an educational agency or institution from disclosing, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11), (13), (14), and (15) of this section.

(Authority: 20 U.S.C. 1232g(a)(5)(A), (b)(1), (b)(2)(B), (b)(6), (h), and (i))

6. Section 99.33 is amended by revising paragraph (c) to read as follows:

§ 99.33 What limitations apply to the redisclosure of information?

* * * * *

(c) Paragraph (a) of this section does not apply to disclosures made to parents of dependent students under § 99.31(a)(8), to disclosures made pursuant to court orders, lawfully issued subpoenas, or litigation under § 99.31(a)(9), to disclosures of directory information under § 99.31(a)(11), to disclosures made to a parent or student under § 99.31(a)(12), to disclosures made in connection with a disciplinary proceeding under § 99.31(a)(14), or to disclosures made to parents under § 99.31(a)(15).

* * * * *

7. A new section 99.39 is added to read as follows:

§ 99.39 What definitions apply to the nonconsensual disclosure of records by postsecondary educational institutions in connection with disciplinary proceedings concerning crimes of violence or non-forcible sex offenses?

As used in this part:

Alleged perpetrator of a crime of violence is a student who is alleged to have committed acts that would, if proven, constitute any of the following offenses or attempts to commit the following offenses that are defined in appendix A to this part:

Arson

Assault offenses

Burglary

Criminal homicide—manslaughter by negligence

Criminal homicide—murder and nonnegligent manslaughter

Destruction/damage/vandalism of property

Kidnapping/abduction

Robbery

Forcible sex offenses.

Alleged perpetrator of a nonforcible sex offense means a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest. These offenses are defined in appendix A to this part.

Final results means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. The disclosure of final results must include only the name of the student, the violation committed, and any sanction imposed by the institution against the student.

Sanction imposed means a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

Violation committed means the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed.

(Authority: 20 U.S.C. 1232g(b)(6))

8. Section 99.63 is revised to read as follows:

§ 99.63 Where are complaints filed?

A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, DC 20202–4605.

(Authority: 20 U.S.C. 1232g(g))

9. Section 99.64 is amended by revising paragraph (d) to read as follows:

§ 99.64 What is the complaint procedure?

* * * * *

(d) The Office may extend the time limit in this section for good cause shown.

10. Appendix A is added to part 99 to read as follows:

Appendix A To Part 99—Crimes of Violence Definitions

Arson

Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.

Assault Offenses

An unlawful attack by one person upon another.

Note: By definition there can be no "attempted" assaults, only "completed" assaults.

(a) *Aggravated Assault.* An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious injury if the crime were successfully completed.)

(b) *Simple Assault.* An unlawful physical attack by one person upon another where neither the offender displays a weapon, nor the victim suffers obvious severe or aggravated bodily injury involving apparent broken bones, loss of teeth, possible internal injury, severe laceration, or loss of consciousness.

(c) *Intimidation.* To unlawfully place another person in reasonable fear of bodily harm through the use of threatening words or other conduct, or both, but without displaying a weapon or subjecting the victim to actual physical attack.

Note: This offense includes stalking.

Burglary

The unlawful entry into a building or other structure with the intent to commit a felony or a theft.

Criminal Homicide—Manslaughter by Negligence

The killing of another person through gross negligence.

Criminal Homicide—Murder and Nonnegligent Manslaughter

The willful (nonnegligent) killing of one human being by another.

Destruction/Damage/Vandalism of Property

To willfully or maliciously destroy, damage, deface, or otherwise injure real or personal property without the consent of the owner or the person having custody or control of it.

Kidnapping/Abduction

The unlawful seizure, transportation, or detention of a person, or any combination of these actions, against his or her will, or of a minor without the consent of his or her custodial parent(s) or legal guardian.

Note: Kidnapping/Abduction includes hostage taking.

Robbery

The taking of, or attempting to take, anything of value under confrontational circumstances from the control, custody, or care of a person or persons by force or threat of force or violence or by putting the victim in fear.

Note: Carjackings are robbery offenses where a motor vehicle is taken through force or threat of force.

Sex Offenses, Forcible

Any sexual act directed against another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent.

(a) *Forcible Rape* (Except "Statutory Rape"). The carnal knowledge of a person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity (or because of his or her youth).

(b) *Forcible Sodomy.* Oral or anal sexual intercourse with another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

(c) *Sexual Assault With An Object.* To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: An "object" or "instrument" is anything used by the offender other than the offender's genitalia. Examples are a finger, bottle, handgun, stick, etc.

(d) *Forcible Fondling.* The touching of the private body parts of another person for the purpose of sexual gratification, forcibly or against that person's will, or both; or not forcibly or against the person's will where the victim is incapable of giving consent because of his or her youth or because of his or her temporary or permanent mental or physical incapacity.

Note: Forcible Fondling includes "Indecent Liberties" and "Child Molesting."

Nonforcible Sex Offenses (Except "Prostitution Offenses")

Unlawful, nonforcible sexual intercourse.

(a) *Incest.* Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

(b) *Statutory Rape.* Nonforcible sexual intercourse with a person who is under the statutory age of consent.

(Authority: 20 U.S.C. 1232g(b)(6) and 18 U.S.C. 16)

Appendix B

Analysis of Comments and Changes

Note: The following appendix will not appear in the Code of Federal Regulations.

Applicability of FERPA to Educational Agencies and Institutions (§ 99.1)

Comments: One commenter suggested that examples of an "educational agency and institution" should be provided in the regulations to resolve any confusion caused by the definition. Another commenter asked if the definition applies to State boards of control and governing boards of multi-campus college and university systems.

Discussion: FERPA applies to educational agencies and institutions to which funds have been made available under any program administered by the Secretary. The term "educational agency or institution" is not defined in the statute. Our revision clarifies that FERPA applies only to those agencies that direct or control the public elementary or secondary, or postsecondary educational institutions. These agencies include local schools districts or local school boards. We have deleted the phrase "and performs service functions for" because it is confusing, and have rewritten the definition to make it clearer.

For example, we would not consider a "State educational agency" (SEA) to be an "educational agency" under FERPA unless an SEA is authorized to direct and control public elementary, secondary or postsecondary educational institutions. Likewise, State boards of control and governing boards of multi-campus college and university systems may be educational agencies under FERPA if they are authorized to direct and control the institutions within their jurisdiction and if they receive Departmental funding. This authority to direct and control institutions varies according to State law.

Changes: We have revised § 99.1(a)(2) to apply to an educational agency that is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.

Definitions (§ 99.3)

Dates of Attendance

Comments: Several commenters supported our more detailed explanation of the meaning of "dates of attendance."

Discussion: We believe that the clarification of the term "dates of attendance" will provide more detailed guidance to educational agencies and institutions because there has been some confusion over the term.

Changes: Although no substantive changes were made to the term "dates of attendance," we have created a separate paragraph for the definition.

Directory Information

Comments: Four commenters suggested that student e-mail addresses be added to the list of examples of records that may be disclosed as "directory information." One of the commenters noted that e-mail is the preferred method of communication at his institution, and that e-mail is now the primary means of communication with respect to many course-related activities. Another commenter also suggested adding class schedules and class rosters to the list. Two commenters, however, expressed concern about the safety of students if these types of information were made public. Both commenters asked that we discuss the opt-out provision because they felt many parents and students are not aware of this provision.

One commenter noted that "photograph" should not be included as "directory information" because some photographs may be taken involuntarily, such as student identification card photos. The commenter contended that institutions and the Department could be liable in an action for invasion of privacy for misappropriation of a person's likeness. The commenters believed that this could occur where an institution used photos in school catalogs.

Discussion: The examples of "directory information" listed in the regulations are not intended to be exhaustive. Rather, the examples illustrate the types of records that would not generally be considered harmful or an invasion of privacy if disclosed. We agree that as methods of communication and record management continue to evolve, it is useful to list additional categories of information that we believe are directory information, such as a student's e-mail address and photograph.

We do not believe that the disclosure of student e-mail addresses will generally be considered harmful or an invasion of privacy. We think that a student's e-mail address is analogous to a student's mailing address, an item already included as directory information.

The Department also has concluded that a student's photograph is a type of identifying information, like a name and address, that would generally not be harmful or an invasion of privacy if disclosed. Unlike social security numbers (SSNs), we do not believe that disclosure of photographs will allow access to other types of sensitive information such as disciplinary files or grades.

For parents or eligible students who do not wish to have institutions disclose photographs or any other category of directory information, FERPA affords them with an additional protection. FERPA requires schools to provide parents and eligible students with an opportunity to opt out of disclosing "directory information."

In response to the comments we received about class rosters and class schedules, we have decided not to include them in the regulations. We will reevaluate our previous advice that defined these items as "directory information" and further consider the concerns raised by commenters about student safety.

In particular, we are concerned that the inclusion of class rosters and class schedules may lead schools to disclose sensitive information. For instance, we believe a school's disclosure of the class schedule of a student enrolled in a special education or remedial class would be harmful or an invasion of privacy. Additionally, many class rosters include students' SSNs or other identification numbers; a disclosure of this information, even if class roster were designated as directory information, would be a violation of FERPA.

Changes: On the basis of comments that we received, we have revised the definition of directory information by adding student e-mail addresses. Additionally, as proposed in the NPRM, we have added as types of directory information enrollment status and photograph.

Sole Possession Records

Comments: Many commenters noted that the proposed definition of "sole possession records" should be clarified. These commenters were particularly concerned about the proposed phrases in the definition such as "typically maintained by the school official unbeknownst to other individuals" and "information taken directly from a student." The commenters contended that a personal note that is not known to or shared with other staff should be considered a sole possession record, even if the student knows about the note or if the information comes from the student.

One commenter noted that the proposed definition excepted records used to make decisions about the student. The commenter believed that this exception could technically apply to the most minor decision about the student. Another commenter stated that the proposed changes seemed to define "sole possession records" out of existence.

Discussion: We agree that our proposed definition of "sole possession records" requires modification. In the NPRM, we sought to clarify that "sole possession records" do not include evaluations of student conduct or performance. We have decided that some of the requirements in our proposed definition could be confusing.

The main purpose of this exception to the definition of "education records" is to allow school officials to keep personal notes private. For example, a teacher or counselor who observes a student and takes a note to remind himself or herself of the student's behavior has created a sole possession record, so long as he or she does not share the note with anyone else.

Changes: We have decided not to make the revisions we proposed in the NPRM to the definition of "sole possession records" in § 99.3. We have clarified this definition by making minor changes.

Rights of Students (§ 99.5)

Comments: Two commenters asked that the provision address whether a student has access to an admissions file after having been accepted for admission but before enrolling.

Discussion: The amendment clarifies that a student attending an educational institution who applies for admission to a separate component of the institution and is rejected does not have any FERPA rights with respect to records maintained by that separate component of the institution. That student does not have these rights because he or she has not attended that separate component. Similarly, a student who is admitted to a separate component of an institution does not have FERPA rights with respect to the records of that component until he or she enrolls and becomes a student in attendance there. Each institution may determine when a student is in attendance in accordance with its own enrollment procedures.

Changes: We have revised § 99.5 to clarify that a student does not have FERPA rights with respect to records collected and maintained by a separate component of an educational institution, including records concerning the student's application for admission, if the student has not actually attended the other component.

Conditions Under Which Prior Consent Is Not Required To Disclose Information (§ 99.31)

Disclosures to the U.S. Attorney General (§ 99.31(a)(3)(ii))

Comments: A commenter expressed concern that the statutory term "for law enforcement purposes" is confusing and asked for clarification of the term. A commenter asked if "authorized representatives of the Attorney General of the United States" includes only special agents in the Department of Justice or the Federal Bureau of Investigation. This commenter also asked how this provision differs from the exception in FERPA for disclosing education records without consent in compliance with a subpoena. One commenter suggested that the Family Policy Compliance Office (FPCO) work with the Attorney General and educational associations to develop a form to document appropriate demographic information and circumstances supporting the Attorney General's request for education records.

Another commenter was concerned that the amendment may allow the Attorney General to have access to the records of an individual student who is suspected of a crime. The commenter added that this provision should apply only to crimes committed by an institution to defraud the Federal government or Federally funded programs. Another commenter noted that when disclosure is made to another governmental agency without consent, it should be made clear that the agency must protect the information from unauthorized redisclosure.

Discussion: The statutory amendment provides for nonconsensual disclosure of education records to authorized representatives of the Attorney General for law enforcement purposes under the same conditions that apply to the Secretary. In the case of the Attorney General, "law enforcement purposes" refers to the investigation or enforcement of Federal legal requirements applicable to federally supported education programs. For example, under this exception, the authorized representatives of the Attorney General can access education records without consent in order to investigate or enforce Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Equal Educational Opportunities Act of 1974, Title IX of the Education Amendments of 1972, Title IV of the Civil Rights Act of 1964, or the Civil Rights of Institutionalized Persons Act (CRIPA). Authorized representatives of the Attorney General include any employee of the Department of Justice, including the Federal Bureau of Investigation, so long as the employee is authorized to investigate or enforce the Federal legal requirements applicable to federally supported education programs.

This exception does not supersede or modify the exception in § 99.31(a)(9) for disclosure in compliance with a judicial order or lawfully issued subpoena. Rather, this new exception permits nonconsensual disclosure of education records in connection with the Attorney General's investigation or enforcement of Federal legal requirements of federally supported education programs. Given the limited nature of the allowable disclosures to the Attorney General, we believe that the development of a form to document the Attorney General's request for education records is not needed.

Finally, in response to the commenter seeking clarification about redisclosure provisions, we agree FERPA's redisclosure provisions apply to disclosures made to authorized representatives of the U.S. Attorney General. Section 99.35(b) provides that officials who collect information under this exception must protect the information, unless Federal law specifically authorizes the collection of that information. Officials must ensure that institutions do not permit personal identification of individuals and that they destroy the records when no longer needed. If another Federal law specifically authorizes the collection of personally identifiable information, then the provisions in that law govern the redisclosure and destruction of information. In addition to the privacy protections afforded parents and students by FERPA, the Privacy Act may afford some protections to some records maintained by Federal agencies. The Privacy Act of 1974 (5 U.S.C. 552a) protects records contained in a system of records maintained by Federal agencies that are retrieved by an individual's name, social security number or some other identifying number.

Changes: We have revised § 99.31(a)(3)(ii) by removing the phrase "for law enforcement purposes." Because disclosures to the Attorney General are subject to § 99.35, those disclosures will only be made to investigate or enforce the Federal legal requirements applicable to federally supported education programs.

Disclosures to Parents of Dependent Students (§ 99.31(a)(8))

Comments: Several commenters requested guidance on how to determine dependency status because the Internal Revenue Code definition of "dependent" is based on the student's status during the previous year.

One commenter noted that the NPRM assumed that the use of the words "either parent" implies that only two individuals might be responsible for a student's upbringing. The commenter noted that a guardian or stepparent might also be involved along with the biological parents.

Another commenter asked if a divorced parent might use this process to obtain financial information in the student's record about another parent. The same commenter also asked if the parent who claims the student as a dependent could restrict the kind of information that the institution may disclose to the other parent.

One commenter felt that this provision would harm victims of domestic violence by allowing the disclosure of information in a student's record to a domestic violence perpetrator. The commenter worried that providing educational institutions with the discretion to make these releases would not effectively safeguard victims of domestic violence. The commenter suggested that institutions be prevented from disclosing information in a student's record about one parent to another parent who has committed domestic violence.

A commenter noted that the regulations should clarify whether parents who obtain information about a dependent student under this provision are subject to the limits on redisclosure of information under § 99.33 of the FERPA regulations.

Two commenters wondered whether the provision applies to students who are legally adults and in conjunction with disclosures under § 99.31(a)(14). These commenters stated that this exception should be limited to a dependent student who is also legally a minor. Finally, this commenter also asked whether students may find out if their parents have accessed their education records.

Discussion: This amendment clarifies that if a student is claimed as a dependent for tax purposes and the individual seeking education records meets the definition of the student's "parent" under FERPA, then the institution has the discretion to disclose records to the parent. Under FERPA, a "parent" is defined as "a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 34 CFR § 99.3 ("Parent").

We have consistently advised that, in order to determine a student's status as a dependent for tax purposes, institutions should look to the most recent year that the parent filed a return. For example, if the parent of a dependent student seeks access to the student's education records in November 1999, the institution should review the taxpayer's 1998 tax return to determine whether the student is a dependent.

Because eligible students—students attending a postsecondary institution or over the age of 18—retain all rights under FERPA, an educational agency or institution must obtain a reasonable assurance that the student meets the requirements as a dependent for tax purposes. If the educational agency or institution is unable to obtain that assurance, then information from the student's education records may not be disclosed. Once the educational agency or institution obtains that assurance, it has the discretion to, although it need not, disclose the student's education records to a parent of the student.

We received several comments concerning the use of this provision by one parent to access information about another parent. In response to these comments, we note that FERPA provides parents with broad rights of access to their children's education records when a child is under 18 and is not attending an institution of postsecondary education. This provision will have a more limited application because it is typically applied by institutions of postsecondary education.

We agree that a divorced parent could attempt to use this exception to obtain financial information in the student's education records about the other parent if the other parent claims the student as a dependent. However, an institution has no obligation to disclose any financial information about one parent to another. Thus, if a parent claims the student as a dependent, and does not want his or her financial information disclosed to his or her spouse or former spouse, the parent may make that request to the institution. The institution has the discretion not to disclose the information to the spouse or former spouse.

Because this provision provides an institution with discretion regarding what information, if any, it discloses to a parent, we do not believe that institutions will release information to known perpetrators of domestic violence. We strongly encourage victims of domestic violence to inform institutions of postsecondary education not to disclose any information from a student's education record to a perpetrator of domestic violence. We believe that institutions will understand the importance of complying with these requests. If a student or parent does not inform an institution of postsecondary education that a parent is a perpetrator of domestic violence, we do not believe it would be reasonable to expect institutions to be aware of this information. We cannot hold schools responsible for disclosures made unknowingly to a perpetrator of domestic violence.

We agree that the regulations should clarify whether parents who obtain information about a dependent student are subject to the limits on redisclosure of information under § 99.33.

This provision applies to education records of students who are legally adults. The plain language of the statute applies to "dependent students" including students who are adults. This provision is not related to disclosures made under the new drug and alcohol provision, contained in § 99.31(a)(14) of these regulations. Finally, dependent students can access their own education records. Under FERPA's recordkeeping requirements, the student's records contain, with some exceptions, documentation of every nonconsensual disclosure made by the institution of personally identifiable information.

Changes: We have revised § 99.31(a)(8) to clarify that it applies to a "parent" as defined under FERPA. We have also clarified in § 99.33(c) that parents who obtain information about a dependent student are not subject to these redisclosure limitations.

Disclosures in Response to Legal Actions (§ 99.31(a)(9)(iii))

Comments: Several commenters support a new provision that allows an educational agency or institution to disclose education records to a court on a nonconsensual basis, without a court order or subpoena, if a parent or eligible student has initiated legal action against the agency or institution and the records are necessary for the agency or institution to defend itself.

Commenters also noted that the Department has issued letters of finding stating that when a parent or student has filed a complaint with a State or Federal government agency, an accrediting agency, or a third party other than a court, an institution may disclose information to that party without consent in order to defend itself. In particular, one commenter stated that the FPCO reversed its previous position and advised institutions that they could disclose information from a student's education record to a third party if the student alleged wrongdoing by the institution to that third party. Several commenters suggested that the regulations should address these additional instances of permissible nonconsensual disclosure. Finally, another commenter asked if third party recipients of education records, involved in litigation with a parent or student, may disclose the student's education records without consent during the course of the litigation.

Discussion: FERPA allows agencies and institutions to disclose education records without consent to comply with a judicial order or lawfully issued subpoena. The statute, however, requires that institutions first must make a reasonable effort to notify the parent or eligible student in advance of the disclosure. The purpose of this prior notification is to give the parent or eligible student an opportunity to object to the issuance of the judicial order or to move to quash the subpoena.

In 1996, the Department revised § 99.31(a)(9) to allow an educational agency or institution that initiated legal action against a parent or student to disclose relevant education records without consent and without a court order or subpoena, provided that the agency or institution had complied with the notification requirements contained in § 99.31(a)(9)(ii).

We also noted in the 1996 final regulations that we interpreted FERPA to allow an educational agency or institution to infer the parent's or student's implied waiver of the right to consent to the disclosure of information from education records if the parent or student had sued the institution. (61 FR 59292, 59294 (November 21, 1996). This interpretation allowed an educational agency or institution to disclose a student's education records to a court without consent, and without a court order or subpoena, in cases where a parent or the student had sued the agency or institution. While we discussed this interpretation in the preamble, we did not include it in the 1996 regulations.

For two reasons, we have concluded that an educational agency or institution may disclose education records to a court without consent and without a court order or subpoena if a parent or student has sued the agency or institution. First, an agency or institution should not be required to subpoena its own records or seek a judicial order in order to defend itself in a lawsuit initiated by a parent or student. Second, we believe that when a parent or eligible student sues an agency or institution, the parent or eligible student understands that the agency or institution must be able to defend itself. In order to defend itself, the agency or institution must be able to use relevant education records of the student. Thus, we believe that the parent or eligible student waives their FERPA protections under a theory of implied consent.

We have also concluded that the notification requirements contained in § 99.31(a)(9)(ii) are not necessary in any litigation between an educational agency or institution and a parent or student. For this reason, we have deleted the notification requirement in former § 99.31(a)(9)(iii) and have not included it in § 99.31(a)(9)(iii)(B) of these regulations.

The notification requirement is intended to provide a parent or student with an opportunity to object to an order or to move to quash a subpoena before an educational agency or institution discloses education records in compliance with the court order or subpoena. However, there is no such reason to require notification of a parent or student if an educational agency or institution sues a parent or student because the parent or student must be served with the lawsuit. Similarly, if a parent or student sues an educational agency or institution, the parent or student will not need to be notified of the lawsuit.

When an educational agency or institution files a lawsuit against a student or parent, the complaint is likely to disclose personally identifiable information from the student's education records. It does not make sense to require that an educational agency or institution inform a parent or student that it plans to disclose personally identifiable information from a student's education records in a complaint because a parent or student cannot do anything to prevent the complaint from being filed. Further, after a complaint has been filed, we do not think that notification of a parent or student is necessary. A parent or student who has been sued by an educational agency or institution should realize that personally identifiable information from the student's education records might be disclosed in the lawsuit. If the parent or student wants to ensure the student's privacy, the parent or student may petition the court to take measures to protect the student's privacy, such as sealing the court's records.

When a student or parent files a lawsuit against an educational agency or institution, the student or parent should realize that the educational agency or institution might need to disclose personally identifiable information from the student's education records in order to defend itself. We also feel that it is overly burdensome to require that an educational agency or institution notify the parent or student every time that it wants to disclose personally identifiable information from the student's education records in the lawsuit. Notification is also unnecessary because a parent or student who sues an educational agency or institution may petition the court to take measures to protect the student's privacy, such as sealing the court's records.

Several commenters asked the Department to extend the theory of implied waiver of the right to consent to a non-litigation context. Specifically, they alluded to the Department's ruling that when a student has taken an adversarial position against the institution, made written allegations of wrongdoing against the institution, and shared this information with third parties, the institution must be able to defend itself. While we offered this interpretation in a previous letter of finding, we did not propose to regulate on this issue in the NPRM. As a result, we cannot include these guidelines in our final regulations.

Finally, in response to the commenter who asked if third party recipients of education records may release student education records if the student or parent sues the third party, we did not address this issue in the NPRM. Thus we cannot regulate on this issue at this time.

Changes: We have added § 99.31(a)(9)(iii)(B) which allows an educational agency or institution to disclose education records to a court without consent, and without a court order or subpoena, if a parent or eligible student has initiated legal action against an educational agency or institution. We have also deleted the notification requirement in § 99.31(a)(9)(iii)(A) so that an educational agency or institution that has initiated legal action against a parent or student does not have to notify the parent or student before disclosing the student's relevant education records.

Disclosure of the Final Results of a Disciplinary Proceeding (§ 99.31(a)(13), § 99.31(a)(14), and § 99.39)

Comments: We received numerous comments about these provisions. The comments fell into four general categories: scope of the provision; the meaning of its terms; its effective date;

and the applicability of FERPA's redisclosure provisions. Specifically, with respect to the second category, commenters sought clarification of the terms "alleged perpetrator," "crime of violence," "nonforcible sex offense," and "final results."

Scope of the Provision

Commenters asked whether postsecondary institutions are now required to disclose the final results of a disciplinary proceeding conducted against an alleged perpetrator of a crime of violence or a non-forcible sex offense or whether the disclosure is discretionary. Commenters added that many public institutions are subject to State open records laws that require the release of records unless that release is contrary to Federal law. Thus, one commenter contended that an institution's discretion to release the final results of specified disciplinary proceedings is an illusion because the amendment eliminated the protection that FERPA had provided against disclosure.

Some commenters asked whether institutions may disclose the final results of a disciplinary proceeding to anyone or to just the victim. One commenter also noted a change to § 99.31(a)(13). He noted that, as proposed, § 99.31(a)(13) would have limited the disclosure of final results to proceedings in which the institution determines that the student committed the violation. The commenter noted, however, that the Department requires notification of the final results of a disciplinary proceeding, regardless of the outcome, to the victim in a sexual assault case.

Definitions: "Alleged Perpetrator"

We received many comments about the definitions used in this provision. Many comments concerned the term "alleged perpetrator of a crime of violence." These commenters noted that this term is confusing. Several commenters asked who is responsible for making the determination that a student is an "alleged perpetrator" of a crime of violence. Specifically, one commenter wondered whether the complainant, the requester, or the institution determines that a student is an "alleged perpetrator."

Commenters also asked when a student becomes "an alleged perpetrator." One commenter wondered if this determination is made when formal criminal charges are brought or sometime earlier in the criminal process. This commenter also wondered what would happen if the charges were dropped or if the student were found not guilty in a court of law. Several other commenters felt that a student should only become an "alleged perpetrator" of a crime of violence after formal criminal charges have been brought. In contrast, some other commenters suggested that Congress intended to cover disciplinary charges whether or not police or other law enforcement officials are involved. They added that the institution must determine whether a student is an "alleged perpetrator" of a crime of violence through the institution's disciplinary process.

Finally, some commenters expressed concern about libel or slander claims if institutions label a student an "alleged perpetrator of a crime of violence," because institutions do not use the terms "alleged perpetrator" or "crime of violence" in their disciplinary codes.

"Crime of Violence"

Many commenters suggested that the regulations should identify more specifically what offenses constitute "crimes of violence." For example, educational institutions asked whether petty property crimes, technical batteries, and other offenses are crimes of violence. College administrators indicated that they must be free to exercise discretion in categorizing incidents as "crimes of violence" without fear of losing institutional funding. Another commenter liked our proposed use of the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting Program definitions.

One commenter asked that the Secretary remove confusing language and permit the disclosure of information for any student who commits a violation of institutional policies involving behavior that includes an element of violence or physical force. This commenter suggested that the term "felony" (which is used in the statutory definition of "crime of violence") should be replaced with "other serious offense." This commenter also asked that we provide examples of what constitutes a "serious" offense. Finally, this commenter asked that the Department recognize the difference between criminal prosecutions and student disciplinary proceedings by changing the term "student charged" to "student found responsible."

"Non-Forcible Sex Offense"

Many commenters wondered whether the new disclosure provisions apply to disciplinary proceedings against alleged perpetrators of a "non-forcible sex offense." The commenters were concerned that if the regulations do not apply to non-forcible sex offenses, postsecondary institutions could continue to keep proceedings secret, even matters involving such offenses as date rape. In short, these commenters were concerned that the term "crime of violence" may not encompass offenses such as date rape and asked that we include and define the term "non-forcible sex offense." One commenter contended that, without a clear definition of "nonforcible sex offense," the institution would be able to manipulate its disciplinary code in order to shield offenses from disclosure.

A commenter stated that the regulations did not define or include the term "non-forcible sex offense" because such an offense is considered a "crime of violence." Another commenter noted that the FBI's Uniform Crime Reporting (UCR) Program defines non-forcible sex offense as statutory rape and incest. However, one commenter contended that Congress did not intend the term "non-forcible sex offense" to include only statutory rape and incest.

"Final Results"

Many commenters stated that the regulations should define when a result is final. They noted that at many institutions a student has a right to appeal or seek review of a decision before a result is truly final. The commenters suggested that "final results" should be defined as that point when all internal institutional appeals have been exhausted. However, another commenter felt that "final results" should be defined earlier in the disciplinary process so that the public can be informed if there is institutional favoritism in the appeals process.

Several commenters also noted that the proposed definition of "final results" was unclear because it did not offer sufficient guidance as to the type of information that may be released. Because the proposed definition of "final results" includes disclosure of the violation committed, these commenters specifically requested that we define the term "violation committed."

One of these commenters contended that the term "violation committed" calls for a plain language description of the behavior that formed the basis of the disciplinary violation. Another commenter suggested that "violation committed" should be defined to include the nature of the offense, including both the institution's categorization or description of the offense and any criminal offenses to which that categorization corresponds, and the date, time and location of the offense. If the term "violation committed" is not defined, commenters believed that institutions could release vague summaries of offenses, such as describing an assault as "disorderly behavior."

Commenters also noted that the definition of the term "final results" calls for the "sanction imposed." Consequently, these commenters requested that we define the term "sanction imposed" to include a description of the disciplinary action, the date of imposition and duration, and definitions of any terms used, such as 'disciplinary probation.'

Several commenters had suggestions about the methods that institutions should use to disclose the final results of disciplinary proceedings. The commenters suggested that we should permit disclosure of the final determination, or the updated crime log required under 20 U.S.C. 1092(f), rather than requiring institutions to create a new, one-line record that constitutes final results. The commenters stated that any crime of violence or non-forcible sex offense should have a related entry on the campus crime log, including the nature, date, time, and general location of each crime and the disposition of the complaint, if known. (20 U.S.C. 1092(f)(4)(A)(i) and (ii)). One commenter noted that new information pertaining to a crime or offense, such as the final results of a disciplinary proceeding, must be included in the campus crime log within two business days. (20 U.S.C. 1092(f)(4)(B)(ii)). He stated that the regulations should also clarify that everything other than the final results of the disciplinary process, such as transcripts of proceedings and other documents, remains protected by FERPA as part of a student's education record.

In contrast, one commenter argued that the statute clearly defines final results. The commenter stated that the statute lists the types of information that may be disclosed as part of the final results of the disciplinary proceeding—the student's name, the violation committed, and any sanction imposed. The commenter noted that any amendment to FERPA that takes away the privacy rights of students should be construed narrowly to protect the intent of the law. Under this reasoning, he stated, the proposed regulatory language should not be modified.

Redisclosure

Some commenters asked that the regulations clarify that redisclosure limitations in § 99.33 do not apply to disclosures under § 99.39. Because the statute provides that final results may be disclosed to anyone, these commenters reasoned that limitations on redisclosure are inappropriate.

Effective Date

Several commenters asked us to address the issue of the effective date of the regulations. In particular, they asked us if the statute applies to determinations of the final result reached after October 7, 1998, or to requests dated after October 7, 1998. These commenters explained that students subject to disciplinary proceedings conducted prior to October 7, 1998 had a legitimate belief that Federal confidentiality laws protected their education records generated during these proceedings. The commenters requested that we continue to ensure that these records remain confidential. In contrast, one commenter felt that the statute should apply to any requests dated after October 7, 1998, regardless of when the records were created. Finally, one commenter asked the Secretary to clarify how institutions should handle requests that were made after October 7, 1998, but before the effective date of the final rule.

Discussion: Scope of the Provision

This new exception to the prior written consent rule does not require postsecondary educational institutions to disclose the final results of disciplinary proceedings to anyone. The disclosure is permissive. Thus, the effect of the amendment is that institutions are now free to follow their own policies regarding disclosure of this information. Institutions should consult with their own counsel or State officials regarding whether their State open records law requires disclosure of the final results of disciplinary proceedings in which a student is found to be an alleged perpetrator of a crime of violence. In response to the commenter who was concerned about State open records laws that require disclosure, FERPA does not prevent that disclosure.

Inadvertent Deletion

In section 99.31(a)(13) of the NPRM, we inadvertently deleted a provision that permits postsecondary institutions to disclose to the victim the results of a disciplinary proceeding against the alleged perpetrator of a crime of violence, regardless of the outcome. We have reinstated that provision, designated as § 99.31(a)(13). Sections 99.31(a)(13) and 99.31(a)(14) differ significantly. Victims may be informed of the final results of a disciplinary proceeding against an alleged perpetrator under § 99.31(a)(13), regardless of the outcome of that proceeding. In contrast, under § 99.31(a)(14), the institution may disclose to the public the final results of a disciplinary proceeding only if it has determined that:

(1) The student is an alleged perpetrator of a crime of violence or non-forcible sex offense; and

(2) The student has committed a violation of the institution's rules or policies with respect to the allegation.

Definitions: "Alleged Perpetrator" and "Crime of Violence"

We have reviewed the numerous comments we received on these terms. In particular, we have considered the comments from school officials that contend that student codes of conduct are not generally written using criminal terms. We agree that the statutory definition of "crime of violence," as defined in 16 U.S.C. 18, is difficult to apply. Therefore, we have re-written the provision to define "crime of violence." The definition consists of an all-inclusive list of "crimes of violence." This list consists of:

Arson
Assault offenses
Burglary
Criminal homicide—manslaughter by negligence
Criminal homicide—murder and nonnegligent manslaughter
Destruction/damage/vandalism of property
Kidnapping/abduction
Robbery
Forcible sex offenses.

We define these crimes according to the Federal Bureau of Investigation's *Uniform Crime Reporting (UCR) Handbook* (1984) and the *UCR Reporting Handbook: National Incident-Based Reporting System* (NIBRS), Volume I (Data Collection Guidelines) (1996). We have listed these definitions in appendix A following these regulations. We have used the same definitions of murder and nonnegligent manslaughter, manslaughter by negligence, forcible sex offenses, non-forcible sex offenses, robbery, aggravated assault, burglary and arson, that are used in the Student Assistance General Provisions, 34 CFR Part 668, because institutions of postsecondary education already are familiar with these definitions. We have taken from the *UCR Reporting Handbook: NIBRS* the definitions for those crimes of violence that are not defined in the Student Assistance General Provisions regulations. Copies of these UCR publications are available from: Programs Support Section, Criminal Justice Information Services Division, Federal Bureau of Investigation, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306–0154.

We believe that this list will be easier to apply for institutions and that a standard set of definitions will allow for more uniform application. In response to the commenter who wondered if a petty property crime or a technical battery would constitute a crime of violence, those incidents are crimes of violence if they fall within the definitions of one of the crimes listed above.

We also agree with commenters that the term "alleged perpetrator" is not clear, and should be clearly defined. We define an "alleged perpetrator" as a student who is alleged to have committed acts that would, if proven, constitute any of the offenses that we have stated are crimes of violence or non-forcible sex offenses. As this definition suggests, we believe that institutions will have to use their judgment on a case-by-case basis about whether certain alleged acts constitute a crime of violence or non-forcible sex offense.

In order to determine if someone is an alleged perpetrator, institutions should look at allegations made as part of the disciplinary proceeding. These allegations can be made by a victim, a third-party witness, or by the institution. These allegations can be made at any time during the disciplinary proceeding, beginning from the time that an initial complaint or a charge is filed, until the final result is reached. This disciplinary process is not related to criminal proceedings. The institution does not need to refer the matter to the police or await any criminal proceedings in order to consider a student an alleged perpetrator of a crime of violence or non-forcible sex offense.

In response to the commenters who expressed concern about possible defamation claims if an institution labels a student "an alleged perpetrator of a crime of violence," we note that the provision merely calls for the school to determine that a student has been alleged to have committed a crime of violence. In short, such a determination does not mean that the student committed a crime of violence, but that an allegation was made that the student engaged in the type of behavior that rises to the level described in the definitions of a crime of violence. We do not believe that a school can be found liable on a defamation claim for this type of determination.

"Non-Forcible Sex Offense"

We agree with the commenters who argued that Congress intended to cover the crimes of date rape and acquaintance rape. However, these two crimes fall within the statutory definition of "crime of violence," specifically within the meaning of "forcible sex offense" as defined in the *UCR Reporting Handbook: NIBRS*. We have clarified that the definition of "an alleged perpetrator of a crime of violence" includes forcible sex offenses such as date rape and acquaintance rape. However, in an effort to avoid any confusion caused by not including a definition of "non-forcible sex offense," we also define the term "alleged perpetrator of a non-forcible sex offense" in the regulations. "Alleged perpetrator of a non-forcible sex offense" is defined as "a student who is alleged to have committed acts that, if proven, would constitute statutory rape or incest." This definition is based on the FBI's definition of "non-forcible sex offense." The definition is listed in appendix A, which follows these regulations.

"Final Results"

The Department is concerned about violence on campus. We recognize the need for students to be aware of how an institution responds to these incidents. Therefore, we have defined "final results" to allow institutions to disclose the results of disciplinary proceedings before all internal reviews and appeals have been exhausted. We define "final results" to mean a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. We believe that this definition will benefit students who have been victims of violent crimes and non-forcible sex offenses. Institutions will not be able to claim that FERPA allows them to release results of disciplinary proceedings only after all internal reviews and appeals have been exhausted.

We agree that the regulations should provide additional guidance regarding how much and what type of information may be provided in the final results. We have defined the term "violation committed" and "sanction imposed" in order to help institutions understand what information may be released. We define "violation committed" as the institutional rules or code sections that were violated and any essential findings supporting the institution's conclusion that the violation was committed. We agree with the commenter that "sanction imposed" should be defined as a description of the disciplinary action taken by the institution, the date of its imposition, and its duration.

We believe that institutions generally will be able to disclose the final results of the disciplinary proceeding without creating new records. An institution may disclose its letter of final determination provided that the institution redacts all personally identifiable information in the letter except those portions that contain the student's name, the violation committed, and the sanction imposed. In other words, the institution must not disclose, without consent, any other portions of the letter of final determination that contain personally identifiable information that is directly related to the accused student or to any other student. If, however, the letter of final determination does not contain the violation committed or the sanction imposed, then the institution has discretion to create a new document in order to disclose this information.

Several commenters suggested that the final results of disciplinary proceedings be released in the form of an updated crime log. Because the release of this information is discretionary under FERPA, we agree with these commenters that the release of an existing crime log, as required by the campus security regulations (34 CFR § 668.46(f)), may be a satisfactory way to disseminate this information. It is worth noting that a crime log contains any crime reported to campus police or a campus security department, rather than only crimes of violence or non-forcible sex offenses.

The release of a campus crime log, however, will not disclose some information that is permitted to be disclosed under FERPA. Specifically, a campus crime log does not contain the names of alleged perpetrators of crimes of violence or non-forcible sex offenses. Rather, a campus crime log includes the nature, date, time and general location of each crime and the disposition of the complaint, if known. (20 U.S.C. 1092(f)(4)(A)(i) and (ii).) Final results that can be disclosed under FERPA, however, concern the name of the student, the disciplinary violation that the student committed, and the disciplinary sanction imposed on the student.

Redisclosure

The redisclosure limitations in § 99.33 do not apply to disclosures made under § 99.31(a)(14) because information about the final results of a disciplinary proceeding concerning a crime of violence or a non-forcible sex offense may be disclosed to anyone, including the media. Thus, we have revised § 99.33.

Effective Date

This amendment to FERPA was effective October 7, 1998. We interpret the effective date to mean the date that an institution reaches its final result in a disciplinary proceeding. This result preserves the expectation of students regarding confidentiality of disciplinary proceedings occurring before the effective date of the statute. Thus, institutions may disclose the final results of a disciplinary proceeding under § 99.31(a)(14) so long as the final results are reached on or after October 7, 1998.

With regard to requests for education records received between October 7, 1998, and the effective date of these final regulations, we will not find that institutions violated FERPA for disclosing the final results of disciplinary proceedings, regardless of when these results were reached. We previously had interpreted the effective date as being the date an institution received a request for records, rather than the date that an institution reached its final results. We will not find that institutions that followed our advice regarding this issue violated FERPA.

Changes: We have reinserted § 99.31(a)(13) in the regulations. This provision permits institutions of postsecondary education to disclose to the victim the final results of a disciplinary proceeding conducted against the alleged perpetrator of a crime of violence or a non-forcible sex offense regardless of the outcome of the proceedings. We have explained that an alleged perpetrator of a crime of violence or non-forcible sex offense should be determined by looking at the allegation that a student has committed a crime of violence or non-forcible sex offense. We have revised the definition of crime of violence to reflect an all-inclusive list of crimes. The list includes forcible sex offenses, such as date rape and acquaintance rape, and non-forcible sex offenses.

We have revised the definition of "final results." The definition means a decision or determination, made by an honor court or council, committee, commission, or other entity authorized to resolve disciplinary matters within the institution. We have also defined "violation committed" and "sanction imposed."

We have clarified that the redisclosure provisions do not apply to disclosures made in connection with a disciplinary proceeding under § 99.31(a)(14).

We have also explained that only final results determined on or after October 7, 1998, may be disclosed without consent under § 99.31(a)(14).

Disclosures to Parents About Drug and Alcohol Violations (§ 99.31(a)(15))

Comments: Many commenters were confused that § 99.31(a)(15) did not address a student's status as a dependent. They asked that we address the relationship between this exception and § 99.31(a)(8).

One commenter felt that using 21 as a dividing line will result in students being treated differently depending on their age. For example, if the institution disciplines the same student before and after the student turns 21, the institution may only disclose the earlier disciplinary determination. The commenter also believed that parents will not understand why they may be notified in the first instance and not in the second.

Another commenter pointed out that is it not clear how an institution should determine a student's age under the exception. The commenter wondered whether the institution should use the student's age when the incident occurs, when the institution determines that a disciplinary violation occurs, or when the institution makes a disclosure. He argued that the institutions should be able to disclose records to parents about violations if the student is under 21 at the time of the drug or alcohol incident.

Another commenter stated that the statute permits disclosure without consent to a "parent" or "legal guardian" but noted that the FERPA regulations define "parent" to include legal guardian, as well as an individual acting as a parent in the absence of a parent or a legal guardian. The commenter asked that the Department clarify the regulations by using only the term "parent," because use of "legal guardian" is confusing and repetitive. Alternatively, he contended that the regulations should use a special, narrower term such as "natural or adoptive parent" because FERPA is a privacy statute and should be construed narrowly. The commenter stated that the Department should also change the definition of "parent" in § 99.3 specifically to include individuals who adopt children.

Another commenter requested that we clarify that the statute does not apply to determinations of disciplinary violations that were made before October 7, 1998. Similarly, a commenter questioned what rule would apply to disclosures made under this exception after the passage of the statute and prior to the promulgation of these regulations.

A commenter stated that this provision, like the statute, is unclear because the term "disciplinary violation" is not defined. The commenter stated that without a regulatory definition of "disciplinary violation," FERPA will not be implemented uniformly throughout the 50 states, as required under 20 U.S.C. 1232g(c), and will vary based on the whims of campus administrators.

A commenter asked if there is any significance in using the term "determination" in § 99.31(a)(15), while using the term "disciplinary proceeding" in § 99.31(a)(14). He also asked if an institution must make a determination in a disciplinary proceeding, or if an institution can make a determination that there has been a violation of its disciplinary code in some other way. For example, the commenter wondered if an institution could determine that a disciplinary violation has been committed and send information to a parent under this provision if a video camera simply recorded an intoxicated student walking around campus. The commenter expressed concern that the threshold could be set so low as to eliminate the phrase "disciplinary violation" from the statute.

Finally, a commenter asked us to explain that students can find out when their parents have been notified of a drug or alcohol violation.

Discussion: This provision applies only to students under the age of 21 at the time of the disclosure to the parent. We clarify that an institution may disclose information under this exception without regard to whether the student is a dependent for tax purposes.

We have concluded that the student must be under 21 years of age at the time that the institution discloses to the student's parent that the student has committed a disciplinary violation with respect to alcohol or drug use or possession. We reach this conclusion because the statute links the institution's option to disclose with the age of the student and the institution's determination that the student committed a disciplinary violation. The Secretary has no statutory authority to allow institutions to disclose alcohol and drug violations of students after they have turned 21.

We agree with the commenter that the use of the term "legal guardian" is repetitive and unnecessary. The statutory term "parent and guardians" is covered by our regulatory definition of the term "parent." Likewise, it would be redundant to include the term "adoptive parents."

In response to the comment about disciplinary violations occurring before October 7, 1998, we conclude that institutions are not permitted to disclose any determinations of disciplinary violations reached before October 7, 1998. This conclusion protects the legitimate expectation of confidentiality that students had regarding drug or alcohol disciplinary violations before October 7, 1998.

With regard to institutional disclosures to parents under this exception occurring after October 7, 1998, but prior to the promulgation of these final regulations, we will not find that institutions violated FERPA so long as the disclosure was based on a reasonable interpretation of the statutory amendment.

We recognize that there is confusion over the terms "determination" and "disciplinary violation." Commenters sought guidance on the meanings of these terms and the responsibilities of postsecondary institutions under this exception.

We note that an institution may make a determination under this exception without conducting any sort of disciplinary proceeding. We reached this conclusion for two reasons. First, we compared the language used by Congress in this exception and the "crime of violence" exception. The "crime of violence" exception permits the disclosure of final results of a disciplinary proceeding conducted by the institution. This statutory provision clearly indicates that, before making any disclosures under this exception, an institution must first conduct some type of hearing or proceeding.

However, the drug and alcohol provision is worded very differently. That statutory provision does not use the term "disciplinary proceeding," and we believe Congress' choice of words was deliberate. Therefore, we do not have the authority to require schools to conduct a disciplinary proceeding in order to determine that a student has committed a disciplinary violation with respect to drug or alcohol use. Institutions may establish and follow their own procedures for making these types of determinations.

The limited nature of this disclosure supports our interpretation that this exception does not require institutions to conduct any sort of formal disciplinary proceeding. This exception permits disclosures only to parents. In contrast, disclosures made in accordance with § 99.31(a)(14) can be made to the public. Thus, we believe that Congress intended to make it easier for institutions to inform parents of drug and alcohol violations by allowing the institution to release the information without conducting a formal disciplinary hearing.

Although we recognize that commenters sought a definition of the term "disciplinary violation," we decline to define this term. We recognize that institutions have different codes of conduct. If we imposed a specific standard for a "disciplinary violation," we would be placing a large burden on institutions to conform their codes of conduct to our regulatory definition. We will not impose such a burden.

In response to the concern that an institution could set the threshold so low as to read the phrase "disciplinary violation" out of the statute, we do not believe that institutions will act irresponsibly when making disclosures under this provision. We also emphasize that this disclosure, as with other permissible disclosures under § 99.31(a), is discretionary. Furthermore, the statutory amendment also provides that this new exception does not supersede any provision of State law that prohibits an institution of postsecondary education from making the permitted disclosure.

Finally, FERPA does not require institutions to notify students each time the institution discloses information from their education record. Institutions, however, are required, with some exceptions, to maintain a record of each disclosure of personally identifiable information from an education record along with that education record. Students at postsecondary institutions have the right under FERPA to access and view their own education records which should include a record of any disclosures made. Postsecondary students who wish to know if their parents have been notified of drug or alcohol violations should seek access to their own education records.

Changes: We revised § 99.31(a)15 by removing the term "legal guardian." We have also specified that a student must be less than 21 years of age when the institution discloses to the parent that the institution has determined that a disciplinary violation has occurred.

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TITLE 34--EDUCATION PART 99--FAMILY EDUCATIONAL RIGHTS AND PRIVACY--

Subpart A-

99.1 To which educational agencies or institutions do these regulations apply?
(a) Except as otherwise noted in Sec. 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if-- (1) The educational institution provides educational services or instruction, or both, to students; or (2) The educational agency provides administrative control of or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions. (b) This part does not apply to an educational agency or institution solely because students attending that agency or institution receive non-monetary benefits under a program referenced in paragraph (a) of this section, if no funds under that program are made available to the agency or institution. (c) The Secretary considers funds to be made available to an educational agency or institution of funds under one or more of the programs referenced in paragraph (a) of this section-- (1) Are provided to the agency or institution by grant, cooperative agreement, contract, subgrant, or subcontract; or (2) Are provided to students attending the agency or institution and the funds may be paid to the agency or institution by those students for educational purposes, such as under the Pell Grant Program and the Guaranteed Student Loan Program (titles IV-A-1 and IV-B, respectively, of the Higher Education Act of 1965, as amended). (d) If an educational agency or institution receives funds under one or more of the programs covered by this section, the regulations in this part apply to the recipient as a whole, including each of its components (such as a department within a university). (Authority: 20 U.S.C. 1232g) [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996]

99.2 What is the purpose of these regulations? The purpose of this part is to set out requirements for the protection of privacy of parents and students under section 444 of the General Education Provisions Act, as amended. (Authority: 20 U.S.C. 1232g) Note: 34 CFR 300.560-300.576 contain requirements regarding confidentiality of information relating to handicapped children who receive benefits under the Education of the Handicapped Act. [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59295, Nov. 21, 1996]

99.3 What definitions apply to these regulations? The following definitions apply to this part: Act means the Family Educational Rights and Privacy Act of 1974, as amended, enacted as section 444 of the General Education Provisions Act. (Authority: 20 U.S.C. 1232g) Attendance includes, but is not limited to: (a) Attendance in person or by correspondence; and (b) The period during which a person is working under a work-study program. (Authority: 20 U.S.C. 1232g) Directory information means information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended. (Authority: 20 U.S.C. 1232g(a)(5)(A)) Disciplinary action or proceeding means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution. Disclosure means to permit access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means. (Authority: 20 U.S.C. 1232g(b)(1)) Educational agency or institution means any public or private agency or institution to which this part applies under Sec. 99.1(a). (Authority: 20 U.S.C. 1232g(a)(3)) Education records. (a) The term means those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution. (b) The term does not include: (1) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record; (2) Records of the law enforcement unit of an educational agency or institution, subject to the provisions of Sec. 99.8. (3)(i) Records relating to an individual who is employed by an educational agency or institution, that: (A) Are made and maintained in the normal course of business; (B) Relate exclusively to the individual in that individual's capacity as an employee; and (C) Are not available for use for any other purpose. (ii) Records relating to an individual in attendance at the agency or institution who is employed as a result of his or her status as a student are education records and not excepted under paragraph (b)(3)(i) of this definition. (4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are: (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity; (ii) Made, maintained, or used only in connection with treatment of the student; and (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, ``treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and (5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution. (Authority: 20 U.S.C. 1232g(a)(4)) Eligible student means a student who has reached 18 years of age or is attending an institution of postsecondary education. (Authority: 20 U.S.C. 1232g(d)) Institution of postsecondary education means an institution that provides education to students beyond the secondary school level; ``secondary school level" means the educational level (not beyond grade 12) at which secondary education is provided as determined under State law. (Authority: 20 U.S.C. 1232g(d)) Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian. (Authority: 20 U.S.C. 1232g) Party means an individual, agency, institution, or organization. (Authority: 20 U.S.C. 1232g(b)(4)(A)) Personally identifiable information includes, but is not limited to: (a) The student's name; (b) The name of the student's parent or other family member; (c) The address of the student or student's family; [[Page 288]] (d) A personal identifier, such as the student's social security number or student number; (e) A list of personal characteristics that would make the student's identity easily traceable; or (f) Other information that would make the student's identity easily traceable. (Authority: 20 U.S.C. 1232g) Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. (Authority: 20 U.S.C. 1232g) Secretary means the Secretary of the U.S. Department of Education or an official or employee of the Department of Education acting for the Secretary under a delegation of authority. (Authority: 20 U.S.C. 1232g) Student, except as otherwise specifically provided in this part, means any individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records. (Authority: 20 U.S.C. 1232g(a)(6)) [53 FR 11943, Apr. 11, 1988, as amended at 60 FR 3468, Jan. 17, 1995; 61 FR 59295, Nov. 21, 1996]

99.4 What are the rights of parents? An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. (Authority: 20 U.S.C. 1232g)

99.5 What are the rights of students? (a) When a student becomes an eligible student, the rights accorded to, and consent required of, parents under this part transfer from the parents to the student. (b) The Act and this part do not prevent educational agencies or institutions from giving students rights in addition to those given to parents. (c) If an individual is or has been in attendance at one component of an educational agency or institution, that attendance does not give the individual rights as a student in other components of the agency or institution to which the individual has applied for admission, but has never been in attendance. (Authority: 20 U.S.C. 1232g(d)) [53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3188, Jan. 7, 1993]

99.7 What must an educational agency or institution include in its annual notification? (a)(1) Each educational agency or institution shall annually notify parents of students currently in attendance, or eligible students currently in attendance, of their rights under the Act and this part. (2) The notice must inform parents or eligible students that they have the right to-- (i) Inspect and review the student's education records; (ii) Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights; (iii) Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that the Act and Sec. 99.31 authorize disclosure without consent; and (iv) File with the Department a complaint under Secs. 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of the Act and this part. (3) The notice must include all of the following: (i) The procedure for exercising the right to inspect and review education records. (ii) The procedure for requesting amendment of records under Sec. 99.20. (iii) If the educational agency or institution has a policy of disclosing education records under Sec. 99.31(a)(1), a specification of criteria for determining who constitutes a school official and what constitutes a legitimate educational interest. (b) An educational agency or institution may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights. (1) An educational agency or institution shall effectively notify parents or eligible students who are disabled. (2) An agency or institution of elementary or secondary education shall effectively notify parents who have

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a primary or home language other than English. (Approved by the Office of Management and Budget under control number 1880-0508) (Authority: 20 U.S.C. 1232g (e) and (f)) [61 FR 59295, Nov. 21, 1996]

99.8 What provisions apply to records of a law enforcement unit? (a)(1) Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, such as a unit of commissioned police officers or non- commissioned security guards, that is officially authorized or designated by that agency or institution to-- (i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution itself; or (ii) Maintain the physical security and safety of the agency or institution. (2) A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student. (b)(1) Records of a law enforcement unit means those records, files, documents, and other materials that are-- (i) Created by a law enforcement unit; (ii) Created for a law enforcement purpose; and (iii) Maintained by the law enforcement unit. (2) Records of a law enforcement unit does not mean-- (i) Records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit; or (ii) Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution. (c)(1) Nothing in the Act prohibits an educational agency or institution from contacting its law enforcement unit, orally or in writing, for the purpose of asking that unit to investigate a possible violation of, or to enforce, any local, State, or Federal law. (2) Education records, and personally identifiable information contained in education records, do not lose their status as education records and remain subject to the Act, including the disclosure provisions of Sec. 99.30, while in the possession of the law enforcement unit. (d) The Act neither requires nor prohibits the disclosure by an educational agency or institution of its law enforcement unit records. (Authority: 20 U.S.C. 1232g(a)(4)(B)(ii)) [60 FR 3469, Jan. 17, 1995]

Subpart B What Are the Rights of Inspection and Review of Education Records?

99.10 What rights exist for a parent or eligible student to inspect and review education records? (a) Except as limited under Sec. 99.12, a parent or eligible student must be given the opportunity to inspect and review the student's education records. This provision applies to-- (1) Any educational agency or institution; and (2) Any State educational agency (SEA) and its components. (i) For the purposes of subpart B of this part, an SEA and its components constitute an educational agency or institution. (ii) An SEA and its components are subject to subpart B of this part if the SEA maintains education records on students who are or have been in attendance at any school of an educational agency or institution subject to the Act and this part. (b) The educational agency or institution, or SEA or its component, shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request. (c) The educational agency or institution, or SEA or its component shall respond to reasonable requests for explanations and interpretations of the records. (d) If circumstances effectively prevent the parent or eligible student from exercising the right to inspect and review the student's education records, the educational agency or institution, or SEA or its component, shall-- (1) Provide the parent or eligible student with a copy of the records requested; or (2) Make other arrangements for the parent or eligible student to inspect and review the requested records. (e) The educational agency or institution, or SEA or its component shall not destroy any education records if there is an outstanding request to inspect and review the records under this section. (f) While an education agency or institution is not required to give an eligible student access to treatment records under paragraph (b)(4) of the definition of Education records in Sec. 99.3, the student may have those records reviewed by a physician or other appropriate professional of the student's choice. (Authority: 20 U.S.C. 1232g(a)(1) (A) and (B)) [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

99.11 May an educational agency or institution charge a fee for copies of education records? (a) Unless the imposition of a fee effectively prevents a parent or eligible student from exercising the right to inspect and review the student's education records, an educational agency or institution may charge a fee for a copy of an education record which is made for the parent or eligible student. (b) An educational agency or institution may not charge a fee to search for or to retrieve the education records of a student. (Authority: 20 U.S.C. 1232g(a)(1))

99.12 What limitations exist on the right to inspect and review records? (a) If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student. (b) A postsecondary institution does not have to permit a student to inspect and review education records that are: (1) Financial records, including any information those records contain, of his or her parents; (2) Confidential letters and confidential statements of recommendation placed in the education records of the student before January 1, 1975, as long as the statements are used only for the purposes for which they were specifically intended; and (3) Confidential letters and confidential statements of recommendation placed in the student's education records after January 1, 1975, if: (i) The student has waived his or her right to inspect and review those letters and statements; and (ii) Those letters and statements are related to the student's: (A) Admission to an educational institution; (B) Application for employment; or (C) Receipt of an honor or honorary recognition. (c)(1) A waiver under paragraph (b)(3)(i) of this section is valid only if: (i) The educational agency or institution does not require the waiver as a condition for admission to or receipt of a service or benefit from the agency or institution; and (ii) The waiver is made in writing and signed by the student, regardless of age. (2) If a student has waived his or her rights under paragraph (b)(3)(i) of this section, the educational institution shall: (i) Give the student, on request, the names of the individuals who provided [[Page 291]] the letters and statements of recommendation; and (ii) Use the letters and statements of recommendation only for the purpose for which they were intended. (3)(i) A waiver under paragraph (b)(3)(i) of this section may be revoked with respect to any actions occurring after the revocation. (ii) A revocation under paragraph (c)(3)(i) of this section must be in writing. (Authority: 20 U.S.C. 1232g(a)(1) (A), (B), (C), and (D)) [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

99.20 How can a parent or eligible student request amendment of the student's education records? (a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record. (b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request. (c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under Sec. 99.21. (Authority: 20 U.S.C. 1232g(a)(2)) [53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

Subpart C What Are the Procedures for Amending Education Records?

99.21 Under what conditions does a parent or eligible student have the right to a hearing? (a) An educational agency or institution shall give a parent or eligible student, on request, an opportunity for a hearing to challenge the content of the student's education records on the grounds that the information contained in the education records is inaccurate, misleading, or in violation of the privacy rights of the student. (b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall: (i) Amend the record accordingly; and (ii) Inform the parent or eligible student of the amendment in writing. (2) If, as a result of the hearing, the educational agency or institution decides that the information in the education record is not inaccurate, misleading, or otherwise in violation of the privacy rights of the student, it shall inform the parent or eligible student of the right to place a statement in the record commenting on the contested information in the record or stating why he or she disagrees with the decision of the agency or institution, or both. (c) If an educational agency or institution places a statement in the education records of a student under paragraph (b)(2) of this section, the agency or institution shall: (1) Maintain the statement with the contested part of the record for as long as the record is maintained; and (2) Disclose the statement whenever it discloses the portion of the record to which the statement relates. (Authority: 20 U.S.C. 1232g(a)(2)) [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59296, Nov. 21, 1996]

99.22 What minimum requirements exist for the conduct of a hearing? The hearing required by Sec. 99.21 must meet, at a minimum, the following requirements: (a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student. (b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing. (c) The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing. (d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under Sec. 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney. (e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing. (f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision. (Authority: 20 U.S.C. 1232g(a)(2))

Subpart D May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

99.30 Under what conditions is prior consent required to disclose information? (a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in Sec. 99.31. (b) The written consent must: (1) Specify the records that may be disclosed; (2) State the purpose of the disclosure; and (3) Identify the party or class of parties to whom the disclosure may be made. (c) When a disclosure is made under paragraph (a) of this section: (1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and (2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed. (Authority: 20 U.S.C. 1232g (b)(1) and (b)(2)(A)) [53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

Subpart D May an Educational Agency or Institution Disclose Personally Identifiable Information From Education Records?

99.31 Under what conditions is prior consent not required to disclose information? (a) An educational agency or institution may disclose personally identifiable information from an education record of a student without the consent required by Sec. 99.30 if the disclosure meets one or more of the following conditions: (1) The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests. (2) The disclosure is, subject to the requirements of Sec. 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll. (3) The disclosure is, subject to the requirements of Sec. 99.35, to authorized representatives of: (i) The Comptroller General of the United States; (ii) The Secretary; or (iii) State and local educational authorities. (4)(i) The disclosure is in connection with financial aid for which the student has applied or which the student has received, if the information is necessary for such purposes as to: (A) Determine eligibility for the aid; (B) Determine the amount of the aid; (C) Determine the conditions for the aid; or (D) Enforce the terms and conditions of the aid. (ii) As used in paragraph (a)(4)(i) of this section, financial aid means a payment of funds provided to an individual (or a payment in kind of tangible or intangible property to the individual) that is conditioned on the individual's attendance at an educational agency or institution. (Authority: 20 U.S.C. 1232g(b)(1)(D)) (5)(i) The disclosure is to State and local officials or authorities to whom this information is specifically-- (A) Allowed to be reported or disclosed pursuant to State statute adopted before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released; or (B) Allowed to be reported or disclosed pursuant to State statute adopted after November 19, 1974, subject to the requirements of Sec. 99.38. (ii) Paragraph (a)(5)(i) of this section does not prevent a State from further limiting the number or type of State or local officials to whom disclosures may be made under that paragraph. (6)(i) The disclosure is to organizations conducting studies for, or on behalf of, educational agencies or institutions to: (A) Develop, validate, or administer predictive tests; (B) Administer student aid programs; or (C) Improve instruction. (ii) The agency or institution may disclose information under paragraph (a)(6)(i) of this section only if: (A) The study is conducted in a manner that does not permit personal identification of parents and students by individuals other than representatives of the organization; and (B) The information is destroyed when no longer needed for the purposes for which the study was conducted. (iii) If this Office determines that a third party outside the educational agency or institution to whom information is disclosed under this paragraph (a)(6) violates paragraph (a)(6)(ii)(B) of this section, the educational agency or institution may not allow that third party access to personally identifiable information from education records for at least five years. (iv) For the purposes of paragraph (a)(6) of this section, the term organization includes, but is not limited to, Federal, State, and local agencies, and independent organizations. (7) The disclosure is to accrediting organizations to carry out their accrediting functions. (8) The disclosure is to parents of a dependent student, as defined in section 152 of the Internal Revenue Code of 1954. (9)(i) The disclosure is to comply with a judicial order or lawfully issued subpoena. (ii) The educational agency or institution may disclose information under paragraph (a)(9)(i) of this section only if the agency or institution makes a reasonable effort to notify the parent or eligible student of the order or subpoena in advance of compliance, so that the parent or eligible student may seek protective action, unless the disclosure is in compliance with-- (A) A Federal grand jury subpoena and the court has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed; or (B) Any other subpoena issued for a law enforcement purpose and the court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed. (iii) If the educational agency or institution initiates legal action against a parent or student and has complied with paragraph (a)(9)(ii) of this section, it may disclose the student's education records that are relevant to the action to the court without a court order or subpoena. (10) The disclosure is in connection with a health or safety emergency, under the conditions described in Sec. 99.36. (11) The disclosure is information the educational agency or institution has designated as ``directory information", under the conditions described in Sec. 99.37. (12) The disclosure is to the parent of a student who is not an eligible student or to the student. (13) The disclosure is to an alleged victim of any crime of violence, as that term is defined in section 16 of title 18, United States Code, of the results of any disciplinary proceeding conducted by an institution of postsecondary education against the alleged perpetrator of that crime with respect to that crime. (b) This section does not forbid an educational agency or institution to disclose, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraphs (a)(1) through (11) and (13) of this section. (Authority: 20 U.S.C. 1232g(a)(5)(A), (b)(1), (b)(2), (b)(4)(B), and (f)) [53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993; 61 FR 59296, Nov. 21, 1996]

99.32 What recordkeeping requirements exist concerning requests and disclosures? (a)(1) An educational agency or institution shall maintain a record of each request for access to and each disclosure of personally identifiable information from the education records of each student. (2) The agency or institution shall maintain the record with the education records of the student as long as the records are maintained. (3) For each request or disclosure the record must include: (i) The parties who have requested or received personally identifiable information from the education records; and (ii) The legitimate interests the parties had in requesting or obtaining the information. (b) If an educational agency or institution discloses personally identifiable information from an education record with the understanding authorized under Sec. 99.33(b), the record of the disclosure required under this section must include: (1) The names of the additional parties to which the receiving party may disclose the information on behalf of the educational agency or institution; and (2) The legitimate interests under Sec. 99.31 which each of the additional parties has in requesting or obtaining the information. (c) The following parties may inspect the record relating to each student: (1) The parent or eligible student. (2) The school official or his or her assistants who are responsible for the custody of the records. (3) Those parties authorized in Sec. 99.31(a) (1) and (3) for the purposes of auditing the recordkeeping procedures of the educational agency or institution. (d) Paragraph (a) of this section does not apply if the request was from, or the disclosure was to: (1) The parent or eligible student; (2) A school official under Sec. 99.31(a)(1); (3) A party with written consent from the parent or eligible student; (4) A party seeking directory information; or (5) A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed. (Approved by the Office of Management and Budget under control number 1880-0508) (Authority: 20 U.S.C. 1232g(b)(1) and (b)(4)(A)) [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

99.33 What limitations apply to the redisclosure of information? (a)(1) An educational agency or institution may disclose personally identifiable information from an education record only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior consent of the parent or eligible student. (2) The officers, employees, and agents of a party that receives information under paragraph (a)(1) of this section may use the information, but only for the purposes for which the disclosure was made. (b) Paragraph (a) of this section does not prevent an educational agency or institution from disclosing personally identifiable information with the understanding that the party receiving the information may make further disclosures of the information on behalf of the educational agency or institution if: (1) The disclosures meet the requirements of Sec. 99.31; and (2) The educational agency or institution has complied with the requirements of Sec. 99.32(b). Paragraph (a) of this section does not apply to disclosures made pursuant to court orders or lawfully issued subpoenas under Sec. 99.31(a)(9), to disclosures of directory information under Sec. 99.31(a)(11), or to disclosures to a parent or student under Sec. 99.31(a)(12). (d) Except for disclosures under Sec. 99.31(a) (9), (11), and (12), an educational agency or institution shall inform a party to whom disclosure is made of the requirements of this section. (e) If this Office determines that a third party improperly rediscloses personally identifiable information from education records in violation of Sec. 99.33 (a) of this section, the educational agency or institution may not

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allow that third party access to personally identifiable information from education records for at least five years. (Authority: 20 U.S.C. 1232g(b)(4)(B)) [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

99.34 What conditions apply to disclosure of information to other educational agencies or institutions? (a) An educational agency or institution that discloses an education record under Sec. 99.31(a)(2) shall: (1) Make a reasonable attempt to notify the parent or eligible student at the last known address of the parent or eligible student, unless: (i) The disclosure is initiated by the parent or eligible student; or (ii) The annual notification of the agency or institution under Sec. 99.6 includes a notice that the agency or institution forwards education records to other agencies or institutions that have requested the records and in which the student seeks or intends to enroll; (2) Give the parent or eligible student, upon request, a copy of the record that was disclosed; and (3) Give the parent or eligible student, upon request, an opportunity for a hearing under subpart C. (b) An educational agency or institution may disclose an education record of a student in attendance to another educational agency or institution if: (1) The student is enrolled in or receives services from the other agency or institution; and (2) The disclosure meets the requirements of paragraph (a) of this section. (Authority: 20 U.S.C. 1232g(b)(1)(B)) [53 FR 11943, Apr. 11, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

99.35 What conditions apply to disclosure of information for Federal or State program purposes? (a) The officials listed in Sec. 99.31(a)(3) may have access to education records in connection with an audit or evaluation of Federal or State supported education programs, or for the enforcement of or compliance with Federal legal requirements which relate to those programs. (b) Information that is collected under paragraph (a) of this section must: (1) Be protected in a manner that does not permit personal identification of individuals by anyone except the officials referred to in paragraph (a) of this section; and (2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section. (c) Paragraph (b) of this section does not apply if: (1) The parent or eligible student has given written consent for the disclosure under Sec. 99.30; or (2) The collection of personally identifiable information is specifically authorized by Federal law. (Authority: 20 U.S.C. 1232g(b)(3))

99.36 What conditions apply to disclosure of information in health and safety emergencies? (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. (b) Nothing in this Act or this part shall prevent an educational agency or institution from– (1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; (2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or (3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student. (c) Paragraphs (a) and (b) of this section will be strictly construed. (Authority: 20 U.S.C. 1232g (b)(1)(I) and (h)) [53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996]

99.37 What conditions apply to disclosing directory information? (a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of: (1) The types of personally identifiable information that the agency or institution has designated as directory information; (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information. (b) An educational agency or institution may disclose directory information about former students without meeting the conditions in paragraph (a) of this section. (Authority: 20 U.S.C. 1232g(a)(5) (A) and (B))

99.38 What conditions apply to disclosure of information as permitted by State statute adopted after November 19, 1974, concerning the juvenile justice system? (a) If reporting or disclosure allowed by State statute concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records are released, an educational agency or institution may disclose education records under Sec. 99.31(a)(5)(i)(B). (b) The officials and authorities to whom the records are disclosed shall certify in writing to the educational agency or institution that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student. (Authority: 20 U.S.C. 1232g(b)(1)(J)) [61 FR 59297, Nov. 21, 1996]

Subpart E What Are the Enforcement Procedures?

99.60 What functions has the Secretary delegated to the Office and to the Office of Administrative Law Judges? (a) For the purposes of this subpart, Office means the Family Policy Compliance Office, U.S. Department of Education. (b) The Secretary designates the Office to: (1) Investigate, process, and review complaints and violations under the Act and this part; and (2) Provide technical assistance to ensure compliance with the Act and this part. (c) The Secretary designates the Office of Administrative Law Judges to act as the Review Board required under the Act to enforce the Act with respect to all applicable programs. The term applicable program is defined in section 400 of the General Education Provisions Act. (Authority: 20 U.S.C. 1232g (f) and (g), 1234) [53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

99.61 What responsibility does an educational agency or institution have concerning conflict with State or local laws? If an educational agency or institution determines that it cannot comply with the Act or this part due to a conflict with State or local law, it shall notify the Office within 45 days, giving the text and citation of the conflicting law. (Authority: 20 U.S.C. 1232g(f))

99.62 What information must an educational agency or institution submit to the Office? The Office may require an educational agency or institution to submit reports containing information necessary to resolve complaints under the Act and the regulations in this part. (Authority: 20 U.S.C. 1232g (f) and (g))

99.63 Where are complaints filed? A parent or eligible student may file a written complaint with the Office regarding an alleged violation under the Act and this part. The Office's address is: Family Policy Compliance Office, U. S. Department of Education, Washington, DC 20202-4605. (Authority: 20 U.S.C. 1232g(g)) [58 FR 3189, Jan. 7, 1993, as amended at 61 FR 59297, Nov. 21, 1996]

Sec. 99.64 What is the complaint procedure? (a) A complaint filed under Sec. 99.63 must contain specific allegations of fact giving reasonable cause to believe that a violation of the Act or this part has occurred. (b) The Office investigates each timely complaint to determine whether the educational agency or institution has failed to comply with the provisions of the Act or this part. (c) A timely complaint is defined as an allegation of a violation of the Act that is submitted to the Office within 180 days of the date of the alleged violation or of the date that the complainant knew or reasonably should have known of the alleged violation. (d) The Office extends the time limit in this section if the complainant shows that he or she was prevented by circumstances beyond the complainant's control from submitting the matter within the time limit, or for other reasons considered sufficient by the Office. (Authority: 20 U.S.C. 1232g(f)) [53 FR 11943, Apr. 11, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

99.65 What is the content of the notice of complaint issued by the Office? (a) The Office notifies the complainant and the educational agency or institution in writing if it initiates an investigation of a complaint under Sec. 99.64(b). The notice to the educational agency or institution– (1) Includes the substance of the alleged violation; and (2) Asks the agency or institution to submit a written response to the complaint. (b) The Office notifies the complainant if it does not initiate an investigation of a complaint because the complaint fails to meet the requirements of Sec. 99.64. (Authority: 20 U.S.C. 1232g(g)) [58 FR 3189, Jan. 7, 1993]

99.66 What are the responsibilities of the Office in the enforcement process? (a) The Office reviews the complaint and response and may permit the parties to submit further written or oral arguments or information. (b) Following its investigation, the Office provides to the complainant and the educational agency or institution written notice of its findings and the basis for its findings. (c) If the Office finds that the educational agency or institution has not complied with the Act or this part, the notice under paragraph (b) of this section: (1) Includes a statement of the specific steps that the agency or institution must take to comply; and (2) Provides a reasonable period of time, given all of the circumstances of the case, during which the educational agency or institution may comply voluntarily. (Authority: 20 U.S.C. 1232g(f))

99.67 How does the Secretary enforce decisions? (a) If the educational agency or institution does not comply during the period of time set under Sec. 99.66(c), the Secretary may, in accordance with part E of the General

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Education Provisions Act– (1) Withhold further payments under any applicable program; (2) Issue a compliant to compel compliance through a cease-and- desist order; or (3) Terminate eligibility to receive funding under any applicable program. (b) If, after an investigation under Sec. 99.66, the Secretary finds that an educational agency or institution has complied voluntarily with the Act or this part, the Secretary provides the complainant and the agency or institution written notice of the decision and the basis for the decision. (Note: 34 CFR part 78 contains the regulations of the Education Appeal Board) (Authority: 20 U.S.C. 1232g(f); 20 U.S.C. 1234) [53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 58 FR 3189, Jan. 7, 1993]

TITLE 20 - EDUCATION
CHAPTER 31 - GENERAL PROVISIONS CONCERNING EDUCATION
SUBCHAPTER III - GENERAL REQUIREMENTS AND CONDITIONS CONCERNING OPERATION AND ADMINISTRATION OF EDUCATION PROGRAMS: GENERAL AUTHORITY OF SECRETARY
Part 4 - Records; Privacy; Limitation on Withholding Federal Funds
-HEAD-
Sec. 1232g. Family educational and privacy rights
-STATUTE-

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations -

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his

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right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which -

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

(B) The term "education records" does not include -

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records

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can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following -

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C)(i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted -

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(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if -

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student. (FOOTNOTE 1)

(FOOTNOTE 1) So in original. The period probably should be a semicolon.

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons; and

(J)(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena.

Nothing in clause (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally

identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless -

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: Provided, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed to prohibit State and local educational officials from having access to student or other records which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the

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conditions specified in the proviso in paragraph (3).

(6)(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding -

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to

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comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from -

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.) shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if -

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

-SOURCE-

(Pub. L. 90-247, title IV, Sec. 444, formerly Sec. 438, as added Pub. L. 93-380, title V, Sec. 513(a), Aug. 21, 1974, 88 Stat. 571; amended Pub. L. 93-568, Sec. 2(a), Dec. 31, 1974, 88 Stat. 1858; Pub. L. 96-46, Sec. 4(c), Aug. 6, 1979, 93 Stat. 342; Pub. L. 101-542, title II, Sec. 203, Nov. 8, 1990, 104 Stat. 2385; Pub. L. 102-325, title XV, Sec. 1555(a), July 23, 1992, 106 Stat. 840; renumbered Sec. 444 and amended Pub. L. 103-382, title II, Sec. 212(b)(1), 249, 261(h), Oct. 20, 1994, 108 Stat. 3913, 3924, 3928; Pub. L. 105-244, title IX, Sec. 951, 952, Oct. 7, 1998, 112 Stat. 1835, 1836.)

-REFTEXT-

REFERENCES IN TEXT

This Act, referred to in subsec. (i)(1), is Pub. L. 90-247, Jan. 2, 1968, 80 Stat. 783, as amended, known as the Elementary and

Secondary Education Amendments of 1967. Title IV of the Act, known as the General Education Provisions Act, is classified generally to this chapter. For complete classification of this Act to the Code, see Short Title of 1968 Amendment note set out under section 6301 of this title and Tables.

The Higher Education Act of 1965, referred to in subsec. (i)(1), is Pub. L. 89-329, Nov. 8, 1965, 79 Stat. 1219, as amended, which is classified principally to chapter 28 (Sec. 1001 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of this title and Tables.

-MISC2-

PRIOR PROVISIONS

A prior section 444 of Pub. L. 90-247 was classified to section 1233c of this title prior to repeal by Pub. L. 103-382.

AMENDMENTS

1998 - Subsec. (b)(1)(C). Pub. L. 105-244, Sec. 951(1), amended subpar. (C) generally. Prior to amendment, subpar. (C) read as follows: "authorized representatives of (i) the Comptroller General of the United States, (ii) the Secretary, or (iii) State educational authorities, under the conditions set forth in paragraph (3) of this subsection;".

Subsec. (b)(6). Pub. L. 105-244, Sec. 951(2), designated existing provisions as subpar. (A), substituted "or a nonforcible sex offense, the final results" for "the results", substituted "such crime or offense" for "such crime" in two places, and added subpars. (B) and (C).

Subsec. (i). Pub. L. 105-244, Sec. 952, added subsec. (i).

1994 - Subsec. (a)(1)(B). Pub. L. 103-382, Sec. 249(1)(A)(ii), added subpar. (B). Former subpar. (B) redesignated (C).

Subsec. (a)(1)(C). Pub. L. 103-382, Sec. 249(1)(A)(i), (iii), redesignated subpar. (B) as (C) and substituted "subparagraph (D)" for "subparagraph (C)" in cl. (iii). Former subpar. (C) redesignated (D).

Subsec. (a)(1)(D). Pub. L. 103-382, Sec. 249(1)(A)(i), (iv), redesignated subpar. (C) as (D) and substituted "subparagraph (C)" for "subparagraph (B)".

Subsec. (a)(2). Pub. L. 103-382, Sec. 249(1)(B), substituted "privacy rights" for "privacy or other rights".

Subsec. (a)(4)(B)(ii). Pub. L. 103-382, Sec. 261(h)(1), substituted semicolon for period at end.

Subsec. (b)(1)(A). Pub. L. 103-382, Sec. 249(2)(A)(i), inserted before semicolon ", including the educational interests of the child for whom consent would otherwise be required".

Subsec. (b)(1)(C). Pub. L. 103-382, Sec. 261(h)(2)(A), substituted "or (iii)" for "(iii) an administrative head of an education agency (as defined in section 1221e-3(c) of this title), or (iv)".

Subsec. (b)(1)(E). Pub. L. 103-382, Sec. 249(2)(A)(ii), amended subpar. (E) generally. Prior to amendment, subpar. (E) read as follows: "State and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974;".

Subsec. (b)(1)(H). Pub. L. 103-382, Sec. 261(h)(2)(B), substituted "the Internal Revenue Code of 1986" for "the Internal Revenue Code of 1954", which for purposes of codification

was translated as "title 26" thus requiring no change in text.
Subsec. (b)(1)(J). Pub. L. 103-382, Sec. 249(2)(A)(iii)-(v), added subpar. (J).
Subsec. (b)(2). Pub. L. 103-382, Sec. 249(2)(B)(i), which directed amendment of matter preceding subpar. (A) by substituting ", unless - " for the period, was executed by substituting a comma for the period before "unless - " to reflect the probable intent of Congress.
Subsec. (b)(2)(B). Pub. L. 103-382, Sec. 249(2)(B)(ii), inserted "except as provided in paragraph (1)(J)," before "such information".
Subsec. (b)(3). Pub. L. 103-382, Sec. 261(h)(2)(C), substituted "or (C)" for "(C) an administrative head of an education agency or (D)" and "education programs" for "education program".
Subsec. (b)(4). Pub. L. 103-382, Sec. 249(2)(C), inserted at end "If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years."
Subsec. (c). Pub. L. 103-382, Sec. 249(3), substituted "Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which" for "The Secretary shall adopt appropriate regulations to".
Subsec. (d). Pub. L. 103-382, Sec. 261(h)(3), inserted a comma after "education".
Subsec. (e). Pub. L. 103-382, Sec. 249(4), inserted "effectively" before "informs".
Subsec. (f). Pub. L. 103-382, Sec. 261(h)(4), struck out ", or an administrative head of an education agency," after "The Secretary" and substituted "enforce this section" for "enforce provisions of this section", "in accordance with" for "according to the provisions of", and "comply with this section" for "comply with the provisions of this section".
Subsec. (g). Pub. L. 103-382, Sec. 261(h)(5), struck out "of Health, Education, and Welfare" after "the Department" and "the provisions of" after "adjudicating violations of".
Subsec. (h). Pub. L. 103-382, Sec. 249(5), added subsec. (h).
1992 - Subsec. (a)(4)(B)(ii). Pub. L. 102-325 amended cl. (ii) generally. Prior to amendment, cl. (ii) read as follows: "if the personnel of a law enforcement unit do not have access to education records under subsection (b)(1) of this section, the records and documents of such law enforcement unit which (I) are kept apart from records described in subparagraph (A), (II) are maintained solely for law enforcement purposes, and (III) are not made available to persons other than law enforcement officials of the same jurisdiction;".
1990 - Subsec. (b)(6). Pub. L. 101-542 added par. (6).
1979 - Subsec. (b)(5). Pub. L. 96-46 added par. (5).
1974 - Subsec. (a)(1). Pub. L. 93-568, Sec. 2(a)(1)(A)-(C), (2)(A)-(C), (3), designated existing par. (1) as subpar. (A), substituted reference to educational agencies and institutions for reference to state or local educational agencies, institutions of higher education, community colleges, schools, agencies offering

preschool programs, and other educational institutions, substituted the generic term education records for the enumeration of such records, and extended the right to inspect and review such records to parents of children who have been in attendance, and added subpars. (B) and (C).

Subsec. (a)(2). Pub. L. 93-568, Sec. 2(a)(4), substituted provisions making the availability of funds to educational agencies and institutions conditional on the granting of an opportunity for a hearing to parents of students who are or have been in attendance at such institution or agency to challenge the contents of the student's education records for provisions granting the parents an opportunity for such hearing, and inserted provisions authorizing insertion into the records a written explanation of the parents respecting the content of such records.

Subsec. (a)(3) to (6). Pub. L. 93-568, Sec. 2(a)(1)(G), (2)(F), (5), added pars. (3) to (6).

Subsec. (b)(1). Pub. L. 93-568, Sec. 2(a)(1)(D), (2)(D), (6), (8)(A)-(C), (10)(A), in provisions preceding subpar. (A), substituted "educational agency or institution which has a policy of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section)" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of permitting the release of personally identifiable records or files (or personal information contained therein)", in subpar. (A), substituted "educational agency, who have been determined by such agency or institution to have" for "educational agency who have", in subpar. (B), substituted "the student seeks or intends to" for "the student intends to", in subpar. (C), substituted reference to "section 408(c)" for reference to "section 409 of this Act" which for purposes of codification has been translated as "section 1221e-3(c) of this title", and added subpars. (E) to (I).

Subsec. (b)(2). Pub. L. 93-568, Sec. 2(a)(1)(E), (2)(E), substituted "educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection" for "state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy or practice of furnishing, in any form, any personally identifiable information contained in personal school records, to any persons other than those listed in subsection (b)(1) of this section".

Subsec. (b)(3). Pub. L. 93-568, Sec. 2(a)(8)(D), substituted "information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements" for "data is specifically authorized by Federal law, any data collected by such officials with respect to individual students

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5917, 9274 of this title; title 8 section 1372; title 25 section 3205; title 42 section 11432.

shall not include information (including social security numbers) which would permit the personal identification of such students or their parents after the data so obtained has been collected".

Subsec. (b)(4). Pub. L. 93-568, Sec. 2(a)(9), substituted provisions that each educational agency or institution maintain a record, kept with the education records of each student, indicating individuals, agencies, or organizations who obtained access to the student's record and the legitimate interest in obtaining such information, that such record of access shall be available only to parents, school officials, and their assistants having responsibility for the custody of such records, and as a means of auditing the operation of the system, for provisions that with respect to subsecs. (c)(1), (c)(2), and (c)(3) of this section, all persons, agencies, or organizations desiring access to the records of a student shall be required to sign forms to be kept with the records of the student, but only for inspection by the parents or the student, indicating specifically the legitimate educational or other interest of the person seeking such information, and that the form shall be available to parents and school officials having responsibility for record maintenance as a means of auditing the operation of the system.

Subsec. (e). Pub. L. 93-568, Sec. 2(a)(1)(F), substituted "to any educational agency or institution unless such agency or institution" for "unless the recipient of such funds".

Subsec. (g). Pub. L. 93-568, Sec. 2(a)(7), (10)(B), struck out reference to sections 1232c and 1232f of this title and inserted provisions that except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-244 effective Oct. 1, 1998, except as otherwise provided in Pub. L. 105-244, see section 3 of Pub. L. 105-244, set out as a note under section 1001 of this title.

EFFECTIVE DATE OF 1992 AMENDMENT

Section 1555(b) of Pub. L. 102-325 provided that: "The amendment made by this section (amending this section) shall take effect on the date of enactment of this Act (July 23, 1992)."

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96-46 effective Oct. 1, 1978, see section 8 of Pub. L. 96-46, set out as a note under section 930 of this title.

EFFECTIVE DATE OF 1974 AMENDMENT

Section 2(b) of Pub. L. 93-568 provided that: "The amendments made by subsection (a) (amending this section) shall be effective, and retroactive to, November 19, 1974."

EFFECTIVE DATE

Section 513(b)(1) of Pub. L. 93-380 provided that: "The provisions of this section (enacting this section and provisions set out as a note under section 1221 of this title) shall become effective ninety days after the date of enactment (Aug. 21, 1974) of section 438 (now 444) of the General Education Provisions Act (this section)."

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 1092, 1232i, 1417, 2304,

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5917, 9274 of this title; title 8 section 1372; title 25 section 3205; title 42 section 11432.

Rights of Non-Custodial Parents in the Family Educational Rights and Privacy Act of 1974[1]

The Family Educational Rights and Privacy Act (FERPA) sets out requirements designed to protect the privacy of parents and students. In brief, the law requires a school district to: 1) provide a parent access to the records that are directly related to the student; 2) provide a parent an opportunity to seek correction of the record he or she believes to be inaccurate or misleading; and 3) with some exceptions, obtain the written permission of a parent before disclosing information contained in the student's education record.

The definition of parent is found in the FERPA implementing regulation under 34 CFR 99.3.

> *"Parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or a guardian.*

Section 99.4 gives an example of the rights of parents

> *An educational agency or institution shall give full rights under the Act to either parent, unless the agency or institution has been provided with evidence that there is a court order, State statute, or legally binding document relating to such matters as divorce, separation, or custody, that specifically revokes these rights.*

This means that, in the case of divorce or separation, a school district must provide access to both natural parents, custodial and non-custodial, unless there is a legally binding document that specifically removes that parent's FERPA rights. In this context, a legally binding document is a court order or other legal paper that prohibits access to education record, or removes the parent's rights to have knowledge about his or her child's education.

Custody or other residential arrangements for a child do not, by themselves, affect the FERPA rights of the child's parents. One can best understand the FERPA position on parents' rights by separating the concept of custody from the concept of rights that FERPA gives parents. Custody, as a legal concept, establishes where a child will live, and often, the duties of the person(s) with whom the child lives. The FERPA, on the other hand, simply establishes the parents' right of access to and control of education record related to the child.

Here are the answers to questions frequently asked about the rights of non-custodial parents.

1. **Does the FERPA require a school to keep a parent informed of the child's progress even though the parent is divorced and living some distance from the child?**

   No. The FERPA does not require schools to inform parents of student progress whether the parents are divorced or not.

2. **Does the FERPA require a school to provide a parent copies of the record?**

   Generally, a school is not required to provide parents copies of the record. However, if the distance is great enough to make it impractical for the parent to visit the school to review the record, the school must make copies of the record and send them to the parent when that parent requests access to the record.

3. **May a school charge for copies of records?**

   Yes. A school may charge a reasonable fee for copying.

4. **Does the non-custodial parent have the right to be informed of and to attend teacher conferences?**

   The FERPA does not address conferences for the purpose of discussing student performance. Thus, a school has no obligation under this law to arrange a conference to accommodate the non-custodial parent. However, if records of conferences are maintained, the non-custodial parent has the right to see those records.

5. **Must the school notify the non-custodial parent of his/her FERPA rights?**

   No. The school would be considered in compliance with the law if it notifies only the parent who has custody of the child.

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[1] The pamphlet was developed by the Family Policy Compliance Office of the U.S. Department of Education.

6. **Must the school provide the non-custodial parent the same general notices it provides the custodial parent?**

   No. General notices, lunch menus, PTA information, announcement of teacher conferences, school pictures, and other similar information, are not "education records" as defined by the FERPA. Therefore, schools are not legally required to provide them.

7. **Is the school required to honor a parent's "standing request" for access or copies?**

   No. The FERPA does not require a school to honor a standing request, but the school may do so if it wishes. If parents wish to obtain information from their child's record on a regular basis, they should submit requests periodically. The school must respond to each request within 45 days.

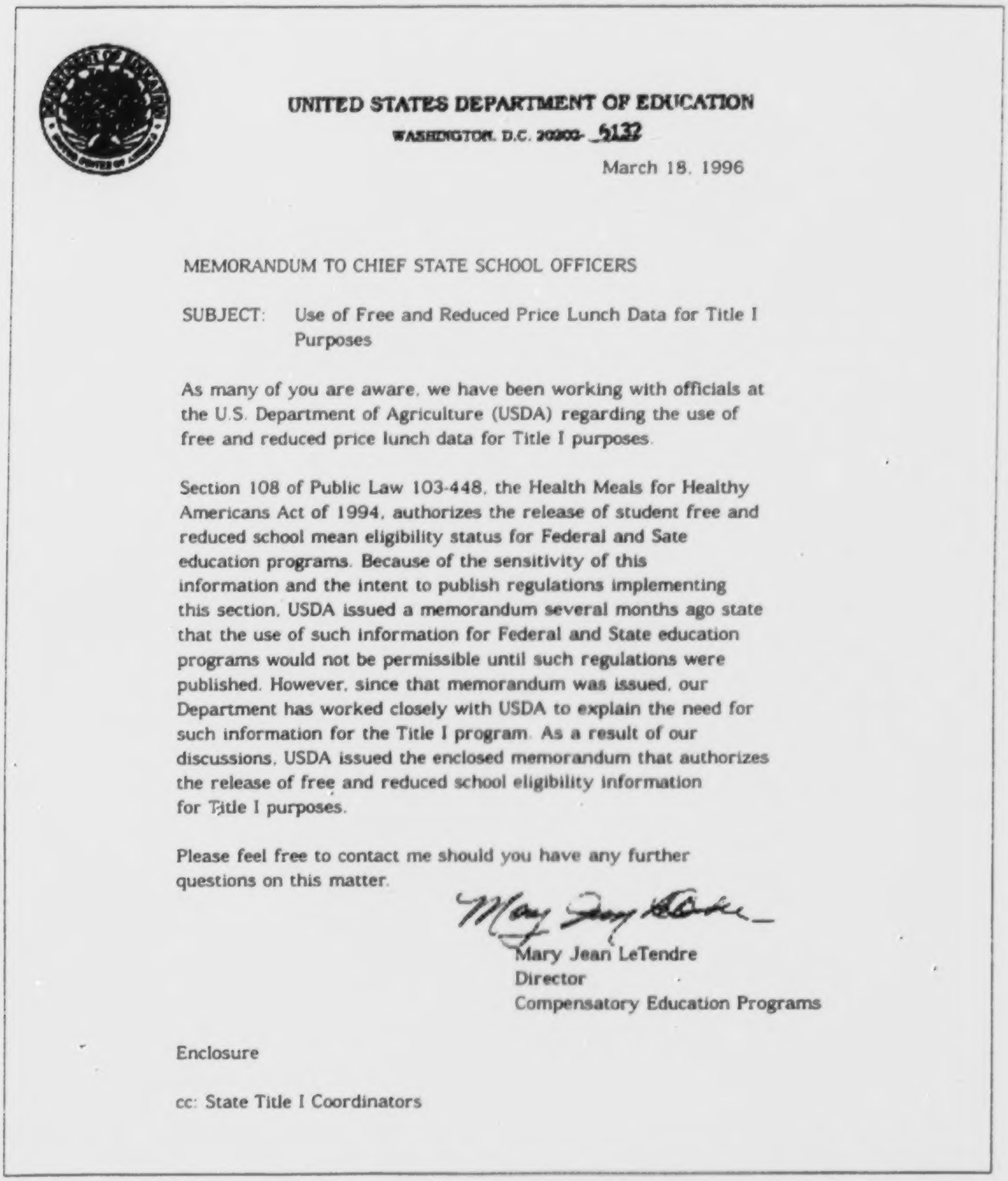
8. **How can a non-custodial parent get access to record?**

   Any parent may ask the school for the opportunity to review the record, either by going to where the record are kept or by requesting copies. The school may ask the parent for some identification.

9. **Can the parent with custody prevent the non-custodial parent from exercising his or her FERPA rights?**

   No. FERPA rights are given to both parents. The school may assume that a parent has these rights unless it has evidence to the contrary. The school does not need the permission of the custodial parent to give access to the non-custodial parent.

Memorandum Regarding the Use of Free and Reduced-Price Lunch Data for Title I Purposes



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202-6132

March 18, 1996

MEMORANDUM TO CHIEF STATE SCHOOL OFFICERS

SUBJECT: Use of Free and Reduced Price Lunch Data for Title I Purposes

As many of you are aware, we have been working with officials at the U.S. Department of Agriculture (USDA) regarding the use of free and reduced price lunch data for Title I purposes.

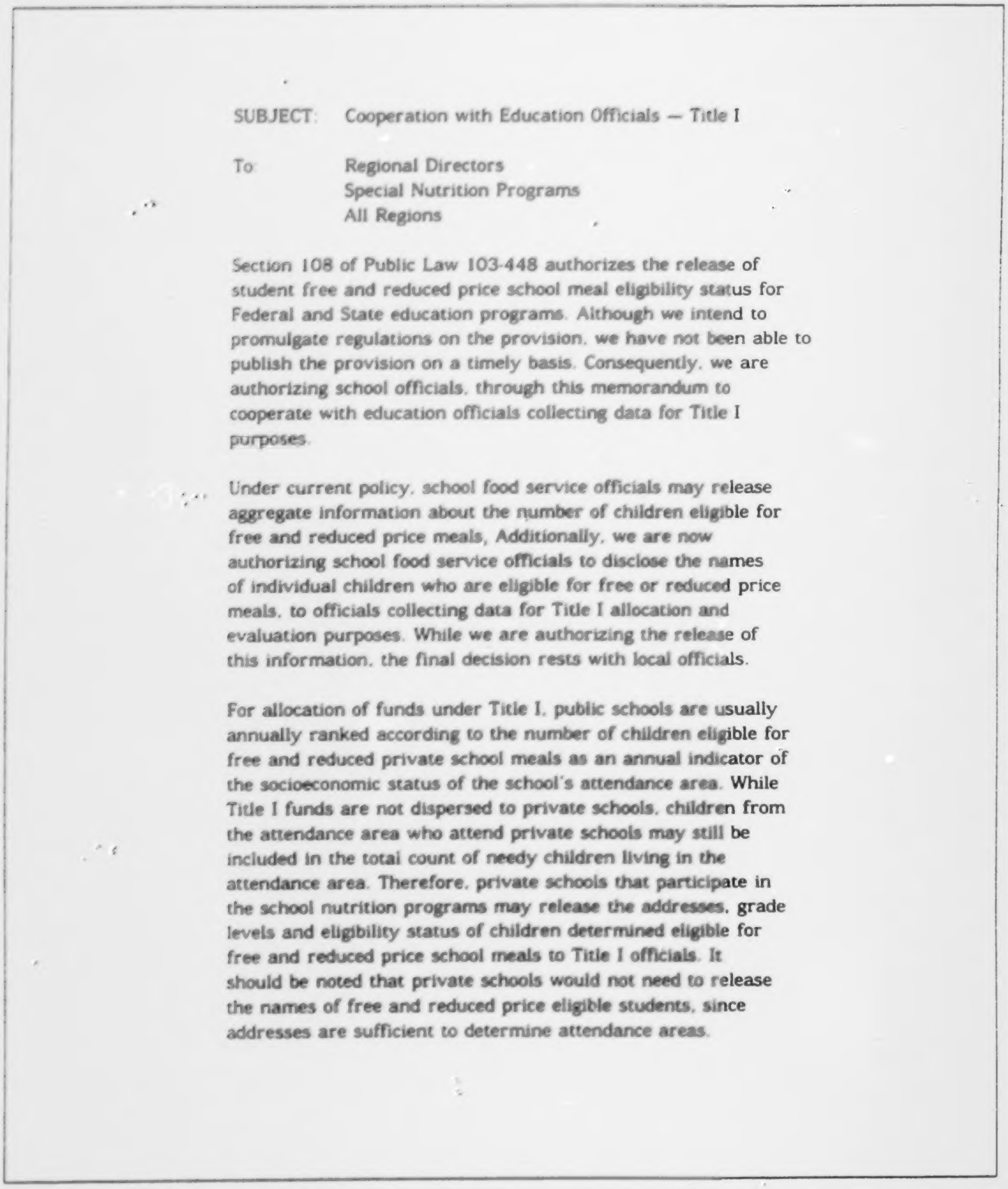
Section 108 of Public Law 103-448, the Health Meals for Healthy Americans Act of 1994, authorizes the release of student free and reduced school mean eligibility status for Federal and Sate education programs. Because of the sensitivity of this information and the intent to publish regulations implementing this section, USDA issued a memorandum several months ago state that the use of such information for Federal and State education programs would not be permissible until such regulations were published. However, since that memorandum was issued, our Department has worked closely with USDA to explain the need for such information for the Title I program. As a result of our discussions, USDA issued the enclosed memorandum that authorizes the release of free and reduced school eligibility information for Title I purposes.

Please feel free to contact me should you have any further questions on this matter.

Mary Jean LeTendre
Director
Compensatory Education Programs

Enclosure

cc: State Title I Coordinators



SUBJECT: Cooperation with Education Officials — Title I

To: Regional Directors
Special Nutrition Programs
All Regions

Section 108 of Public Law 103-448 authorizes the release of student free and reduced price school meal eligibility status for Federal and State education programs. Although we intend to promulgate regulations on the provision, we have not been able to publish the provision on a timely basis. Consequently, we are authorizing school officials, through this memorandum to cooperate with education officials collecting data for Title I purposes.

Under current policy, school food service officials may release aggregate information about the number of children eligible for free and reduced price meals. Additionally, we are now authorizing school food service officials to disclose the names of individual children who are eligible for free or reduced price meals, to officials collecting data for Title I allocation and evaluation purposes. While we are authorizing the release of this information, the final decision rests with local officials.

For allocation of funds under Title I, public schools are usually annually ranked according to the number of children eligible for free and reduced private school meals as an annual indicator of the socioeconomic status of the school's attendance area. While Title I funds are not dispersed to private schools, children from the attendance area who attend private schools may still be included in the total count of needy children living in the attendance area. Therefore, private schools that participate in the school nutrition programs may release the addresses, grade levels and eligibility status of children determined eligible for free and reduced price school meals to Title I officials. It should be noted that private schools would not need to release the names of free and reduced price eligible students, since addresses are sufficient to determine attendance areas.

While in some instances aggregate release of free and reduced price school meal information is sufficient, food service officials may be asked to provide the names and eligibility status of individual children for Title I evaluation purposes. Consequently, school food service officials may cooperate with education officials for evaluation of Title I services. The Department of Education has been advised of this policy in the attached letter to Mary Jean LeTendre, Director of Compensatory Education Programs for that Department.

Please provide your States with copies of this memorandum and attached letter. You may contact Charles Heise or Barbara Semper at (703) 305-2968 with any questions.

SIGNED

Alberta C. Frost
Director
Child Nutrition Division

Attachment

SCHOOL OPENING ALERT

In 1982, the U.S. Supreme Court ruled in _Plyler v. Doe_ [457 U.S. 202 (1982)] that undocumented children and young adults have the same right to attend public primary and secondary schools as do U.S. citizens and permanent residents. Like other children, undocumented students are required under state laws to attend school until they reach a legally mandated age. As a result of the _Plyler_ ruling, public schools ***may not***:

- deny admission to a student during initial enrollment or at any other time on the basis of undocumented status;
- treat a student differently to verify residency;
- engage in any practices to "chill" or hinder the right of access to school;
- require students or parents to disclose or document their immigration status;
- make inquiries of students or parents that may expose their undocumented status;
- or require social security numbers from all students as a condition of admission to school, as this may expose undocumented status.

Students without social security numbers should be assigned a number generated by the school. Adults without social security numbers who are applying for a free lunch and/or breakfast program for a student need only state on the application that they do not have a social security number.

Recent changes in the F-1 (Student) Visa Program ***do not*** change the _Plyler_ rights of undocumented children. These changes apply only to students who apply for a student visa from outside the U.S. and are currently in the U.S. on an F-1 visa.

Also, the Family Educational Rights and Privacy Act (FERPA) prohibits schools from providing any outside agency -- ***including the Immigration and Naturalization Service*** -- with any information from a child's school file that would expose the student's undocumented status without first getting permission from the student's parents. The only exception is if an agency gets a court order -- known as a subpoena -- that parents can then challenge. Schools should note that even requesting such permission from parents might act to "chill" a student's _Plyler_ rights.

Finally, school personnel -- especially building principals and those involved with student intake activities -- should be aware that they have no legal obligation to enforce U.S. immigration laws.

For more information or to report incidents of school exclusion or delay, call:

NCAS	Nationwide	**1-800-441-7192**	English / French / German / Spanish
META	Nationwide	**1-617-628-2226**	English / Spanish
META	West Coast	**1-415-546-6382**	English
NY Immigration Hotline	Nationwide	**1-718-899-4000**	English / Chinese / French / Haitian Creole / Hindi / Japanese / Korean / Polish / Russian / Spanish / Urdu
MALDEF - Los Angeles	Southwest / Southeast	**1-213-629-2512**	English / Spanish
MALDEF - San Francisco	Northwest	**1-415-546-6382**	English / Spanish
MALDEF - Chicago	Illinois	**1-312-782-1422**	English / Spanish
MALDEF - San Antonio	Southwest	**1-210-224-5476**	English / Spanish
Florida Parent Hotline	Florida	**1-800-206-8956**	English / Spanish / Haitian Creole

Please copy and distribute this flyer.

This flyer is available in English, Haitian Creole, Hmong, Portuguese, Spanish, and Vietnamese at 1-800-441-7192 or National Coalition of Advocates for Students, 100 Boylston Street, Suite 737, Boston, MA 02116 **[English - 10/99]**

Model Notification of Rights under FERPA for Elementary and Secondary Institutions[1]

The Family Educational Rights and Privacy Act (FERPA) affords parents and students over 18 years of age ("eligible students") certain rights with respect to the student's education records. They are:

(1) The right to inspect and review the student's education records within 45 days of the day the District receives a request for access.

Parents or eligible students should submit to the school principal [or appropriate school official] a written request that identifies the record(s) they wish to inspect. The principal will make arrangements for access and notify the parent or eligible student of the time and place where the records may be inspected.

(2) The right to request the amendment of the student's education records that the parent or eligible student believes are inaccurate or misleading.

Parents or eligible students may ask Alpha School District to amend a record that they believe is inaccurate or misleading. They should write the school principal, clearly identify the part of the record they want changed, and specify why it is inaccurate or misleading.

If the District decides not to amend the record as requested by the parent or eligible student, the District will notify the parent or eligible student of the decision and advise them of their right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the parent or eligible student when notified of the right to a hearing.

(3) The right to consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that FERPA authorizes disclosure without consent.

One exception which permits disclosure without consent is disclosure to school officials with legitimate educational interests. A school official is a person employed by the District as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel); a person serving on the School Board; a person or company with whom the District has contracted to perform a special task (such as an attorney, auditor, medical consultant, or therapist); or a parent or student serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks.

A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

[Optional] Upon request, the District discloses education records without consent to officials of another school district in which a student seeks or intends to enroll. [NOTE: FERPA requires a school district to make a reasonable attempt to notify the student of the records request unless it states in its annual notification that it intends to forward records on request.]

(4) The right to file a complaint with the U.S. Department of Education concerning alleged failures by the District to comply with the requirements of FERPA. The name and address of the Office that administers FERPA is:

Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605

[NOTE: In addition, a school may want to include its directory information public notice, as required by §99.37 of the regulations, with its annual notification of rights under FERPA.]

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[1] Developed by the Family Policy Compliance Office of the U.S. Department of Education.

MARCH 2000

Inquiry & Analysis

The Bimonthly Publication of the NSBA Council of School Attorneys

E-Mail and Access to Public Meetings and Records: Traps for the Unsuspecting School Board Member

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Heather Asplund
Parker, Covert & Chidester
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INTRODUCTION

School board members generally understand the ramifications of the open meeting and public records laws of their states. However, the enthusiastic and well-intended board member may not have considered whether his or her use of electronic mail ("e-mail") is subject to these laws. The legal reality is that e-mail has as much potential exposure to liability for the district as any other communication subject to the state open meeting law, or as any unprivileged communication ultimately classified as a public record.

A superintendent of a large urban K-12 school district recently opened a Saturday morning board workshop on board-superintendent communication with the following hypotheticals:

Hypothetical No. 1: The superintendent and board members are all members of a list serve that has proven invaluable for keeping board members updated on the nuances of district business. Two of the five board members enthusiastically reply to the superintendent's e-mail communication concerning an upcoming expulsion hearing. Although the superintendent had not solicited a vote or a response, the two board members were only too happy to share their opinions. Because of the way a list serve works, all the other board members automatically received each of the replies. Has there been a violation of the state open meeting law?

Hypothetical No. 2: A member of the public, who also happens to be the disgruntled parent of the student recommended for expulsion at the next board meeting, requests under state public records laws copies of all board communications pertaining to pupil expulsions, *and* copies of all communications on items agendized for the upcoming board meeting. Is the parent entitled to receive copies of e-mail communications detailed in Hypothetical No. 1, above? Would these be available under a state public records act? Under FERPA?

With the escalating use of advanced technology within public school districts, school leaders must consider the legal implications of using e-mail to conduct public business. All 50 states have laws requiring that public entities open certain meetings to the public, and allowing the public access to documents and records unless a statutory exemption applies. The laws are typically interpreted broadly to ensure the public is involved in government decision-making. The increasing use of e-mail has raised the issue of whether such correspondence must be open to or made available to the public. For example, under open meetings laws, a question may arise as to whether a "meeting" has actually transpired when serial e-mail correspondence passed between school district board members, and whether they have unlawfully arrived at a consensus outside of a lawfully posted and convened meeting by utilizing e-mail. With respect to public records laws, the question arises as to whether disclosures of interoffice e-mail communications may be demanded by a member of the public in the same manner as a paper interoffice memo.

The law on these issue varies by jurisdiction, although common threads woven through the laws in most states provide helpful guidance for examining whether the use of e-mail impacts public disclosure statutes. Additionally, a review of the limited case law on the subject reveals that e-mail correspondence is often treated the same as other means of communication when interpreting public records and open meeting laws. Although the laws of a number of representative jurisdictions are considered below, it is by no means intended to be a comprehensive summary of laws in all 50 states. Each school district should look to the

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laws of its jurisdiction when determining whether e-mail correspondence between employees, between board members, or between employees and board members, is subject to public notice or disclosure requirements.

OPEN MEETINGS

Open meetings laws, commonly referred to as "sunshine" laws, typically require that meetings held to discuss public business be open to the public, absent a statutory exemption. The purpose behind sunshine laws is to allow the public to participate in, or have access to, matters of public interest. One author has described the benefits of conducting open meetings on matters of public interest as follows:

> [O]penness may inspire public officials to a higher quality of work. The public's watchful eye might promote a higher rate of attendance at meetings, improve planning of meetings, and encourage more thorough preparation and more complete discussion of issues by participating officials. Moreover, openness leads to better informed decision making because open meetings generate public input and criticism.
>
> The government also benefits from openness because better preparation and public input allow agency members to gauge public preferences accurately, and thereby tailor their actions and policies more closely to public needs. Public confidence and understanding ease potential resistance to government programs. The benefits of openness, therefore, inure to both the public affected by government decision making and the decision makers themselves.

Barrett, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act,* 66 TEX. L. REV. 1195, 1196-1197 (1998) (citations omitted).

Sunshine laws balance the public's right to be involved in government decision-making with the confidentiality rights of the governmental agency or its employees, students, or clients. While public involvement is encouraged and often required under sunshine laws, government employees are also afforded the opportunity, under particular circumstances, to meet behind closed doors to discuss confidential matters specified by state law.

California

In California, the Ralph M. Brown Act reads in relevant part: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." CAL. GOV'T CODE § 54953(a).

Relevant exceptions to this general provision include certain meetings with legal counsel about pending litigation, meetings with legal authorities on matters posing a security threat to public buildings, meetings on purely personnel matters, and specified meetings to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee. CAL. GOV'T CODE §§ 54956.9, 54957.

A "meeting" is defined under CAL. GOV'T CODE § 54952.2 as including "any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains."

Although the open meeting law in California does not expressly address e-mail correspondence, it provides that legislative bodies of local agencies may use teleconferencing in connection with any meeting authorized by law. CAL. GOV'T CODE § 54953(b). It further requires that if teleconferencing is used to conduct a meeting that falls within Government Code section 54953, agendas must be posted at all teleconference locations, and the locations must be accessible to the public. *Id.* Because California's open meeting law places teleconferencing within the definition of "meeting," it is likely that other means of electronic communication, such as e-mail, would also be subject to California's sunshine law.

In *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal. App.3d 95, 214 Cal. Rptr. 561 (1985), the California Court of Appeal held that a series of nonpublic telephone conversations, each between a member of a local development agency and its attorney for the purpose of obtaining a commitment of a majority of that body on a matter of public business, constituted a meeting under the state's open meeting law. The court rejected the argument that the series of one-on-one telephone conversations did not constitute a "meeting" because they were conducted serially rather than simultaneously. The court said:

> Defendants argue that because the alleged telephone conversations were conducted serially as opposed to simultaneously as in the case of a "speaker phone" conference call among a majority of the members, the case falls within the statutory exception to the open meeting requirement where less-than-a-quorum of the governing body is at any one time involved. Section 54952.3 excludes from the "legislative bodies" to which the Brown Act applies, "a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." However, this exception contemplates that the part of the governing body constituting less than a quorum "will report back to the parent body where there will *then* be an opportunity for public discussion of matters not already considered by the full board or a quorum thereof."

Id. at 102-103, 214 Cal. Rptr. at 565 (citations omitted, emphasis in original).

In the *Stockton Newspapers* case, the court held that, "such deliberation connotes not only collective discussion, but also the 'collective acquisition and exchange of facts' pertaining to the ultimate decision," and found the state's open meeting law to apply to collective investigation and consideration of the facts short of official action.

This holding makes it probable that serial e-mail transmissions related to public business that result in a majority of the legislative body exchanging information concerning their individual positions will fall within the purview of the open meeting laws, even though e-mail communication is typically not simultaneous in nature. A list serve that automatically routes a message to all members of a school board can be particularly ubiquitous if a board member intends to communicate his/her views on an issue only to the superintendent, but inadvertently copies all other board members as to how he intends to vote on an issue. *See generally* LEGAL ISSUES AND EDUCATION TECHNOLOGY, A SCHOOL LEADER'S GUIDE (National School Boards Association, 1999).

In the recent case of *Regents of University of California v. Superior Court*, 20 Cal.4th 509, 85 Cal. Rptr. 2d 257 (1999), the California Supreme Court addressed a matter involving the state's open meeting law. In a concurring opinion, Justice Brown commented that the underlying issue in the case, which was not addressed by the majority opinion, was whether "substantive discussions of official matters—whether conducted by telephone, letter, electronic mail, or face-to-face" among members of a state government body are required to be open to the public under the open meeting laws. *Id.* at 537, 85 Cal. Rptr. 2d at 274.

Justice Brown also questioned whether the court of appeal's broad definition of the term "meeting" in *Stockton Newspapers*, was intended by the legislature. Although Justice Brown directed much of her discussion to the deliberative process of the executive branch, and questioned whether prior case law defining "meeting" under the open meeting laws has rendered too broad an interpretation, the fact that e-mail transmissions have been identified as an issue by the California Supreme Court signals that additional case law on the issue is imminent.

Like many other states, California's open meeting laws prohibit the use of technological devices by a majority of the members of a legislative body to develop a collective concurrence on actions to be taken on an item of public business. CAL. GOV'T CODE § 54952.2(b). Accordingly, electronic mail may not be used by members of a local agency to circumvent the open meeting laws. California school districts should operate under the assumption that e-mail communication between a majority of the members of the school board is subject to the requirements of the open meeting laws to the same extent as other correspondence related to public business. Purely personal e-mail exchanged by board members that does not touch on matters under the board's jurisdiction is not subject to agenda and meeting requirements. E-mail transmissions between less than a majority of board members would likely not be considered a "meeting" requiring an agenda, nor a gathering open to the public.

Florida

Florida's sunshine law provides a right of access to state and local governmental meetings, and has been generally applied to any gathering of two or more members of the same board to discuss matters that will foreseeably come before the board for action in the future. FLA. STAT. ANN. § 286.011. The Florida Supreme Court has stated the law is to be construed "so as to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So.2d 473, 477 (1974). A provision allowing right of access to meetings of collegial public bodies is also contained in the Florida Constitution, and was approved by voters in 1992. FLA. CONST. art. I, § 24. Virtually all collegial public bodies are subject to the constitutional amendment, with the exception of the judiciary and the state legislature.

A Florida Attorney General opinion concluded that the Florida Sunshine Law authorizes *state* agencies to conduct meetings through electronic means, provided the board complies with uniform rules of procedure adopted by the state administration commission. Fla. Att'y Gen. Op. 98-28. The authorization to conduct meetings via electronic means applies only to state agencies. Therefore, because Florida law (FLA. STAT. ANN. § 230.17) requires that district school boards conduct their meetings at a "public place in the county," a quorum of the school board must be physically present at the meeting. The board may, however, use electronic technology to enable an absent board member to attend the meeting. *See* Florida Attorney General, GOVERNMENT-IN-THE-SUNSHINE MANUAL (1999).

With regard to computers and e-mail, the Attorney General concluded that the use of computers to conduct public business is subject to Florida's Sunshine Law. Fla. Att'y Gen. Op. 89-39. For instance, if a member of a school board e-mails to other board members a report informing them of issues to be discussed at an upcoming board meeting, the Florida Sunshine Law has not been violated. If, however, the board member e-mails the report to other board members and invites comments, and a number of board members proceed to exchange via e-mail opinions on matters they are scheduled to act on at the next board meeting, a violation of the Florida Sunshine Law has occurred. *See* Fla. Att'y Gen. Ops. 90-03, 96-35.

Missouri

Although the Missouri courts have not specifically addressed whether e-mail communications constitute "meetings" under the state's open meeting laws, case law defining "meeting" provides guidance on this issue. For example, in *Colombo v. Buford*, 935 S.W.2d 690 (Mo. Ct. App. 1996), a lawsuit filed against members of a school board alleged various violations of the state's sunshine law. The board members had engaged in one-on-one conversations, in person and over the telephone, regarding the renewal of the superintendent's contract and his overall performance. No poll was ever taken, however, on the issue of whether the superintendent's services should be retained. The court held that the series of one-on-one personal and telephonic conversations at issue did not constitute a closed meeting of a public government body that violated the open meeting law. With regard to the mandate in Missouri's Sunshine Law that a quorum of members of the public governmental body be present for there to be a "meeting," the court noted:

> Courts are not so naive as to be blind to the fact that those inclined to violate the Open Meeting Laws could do so by using the quorum requirement as a shield. This could be done by conducting, in effect, the equivalent of a "public meeting" in a series of "closed meetings" with numbers of less than a quorum in each such meeting, but totaling a quorum or more when taken together. In such closed meetings with less than a quorum,

> deliberations could be conducted and votes taken with a public meeting then being held to ratify publicly that which had already been done in private. This would violate the spirit of our Sunshine Law, and would render an unreasonable result that was not intended by our legislature.

Id. at 699, citing *David Ranken, Jr. Tech. Inst. v. Boykins*, 816 S.W.2d 189, 192 (Mo. 1991).

The *Colombo* decision indicates a series of telephone conversations may violate the Missouri Sunshine Law if a quorum of board members discuss a matter of public business that should be addressed in public. This is likely the case even if, for example, one board member leaves voicemail messages for a majority of the other board members on a matter of public interest, and those board members return his or her call at various times over the next few days. An analogy can easily be drawn between that scenario and one in which a school board member sends an e-mail message to other board members, and those board members respond by return e-mail at their leisure. It is therefore likely that e-mail transmissions are covered by Missouri's Sunshine Law, and would be considered "meetings" that merit public participation if a matter of public business is discussed among a quorum of the governmental body.

The *Colombo* decision also emphasizes that the quorum requirement should not be used to circumvent the purpose of the open meeting laws. A school board member should not be permitted to talk to other board members behind closed doors on a one-on-one basis if he or she would violate the open meeting law by discussing the same matter with a quorum of board members. The principles articulated in *Colombo* were reaffirmed by the Eighth Circuit Court of Appeals in *Hanten v. School Dist. of Riverview Gardens*, 183 F.3d 799 (8th Cir. 1999).

Nevada

The Supreme Court of Nevada directly addressed the issue of whether the use of serial electronic communications to deliberate matters of public interest violates Nevada's open meeting laws in *Del Papa v. Board of Regents of the University and Community College System of Nevada*, 956 P.2d 770 (1998). In *Del Papa*, Nancy Price, a member of the University Board of Regents made several public comments criticizing her fellow regents. The chairman of the board then asked the director of public education to draft a response. This media advisory was disseminated by facsimile to all board members, except Price, along with a memorandum requesting feedback. The board members responded to the draft advisory through telephone calls charged on the university's calling card. It was ultimately determined that the media advisory would not be released.

After receiving a complaint from Price, the state attorney general filed a lawsuit charging, among other things, a violation of the state's open meeting law because the regents determined whether to issue the media advisory after consulting by facsimile and telephone rather than by public meeting. The Nevada Supreme Court noted the term "meeting" as used in its open meeting law is defined as:"'[T]he gathering of members of a public body at which a quorum is present to deliberate toward a decision or to [take action] on any matter over which the public body has supervision, control, jurisdiction, or advisory power.'" *Id.* at 773, citing Nev. Rev. Stat. § 241.015(2).

Further, Nevada law provides that "'electronic communication . . . must not be used to circumvent the spirit or letter of [NRS chapter 241] in order to discuss or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory powers.'" *Id.*, citing Nev. Rev. Stat. § 241.030(4). After consideration of relevant case and statutory law, the Nevada Supreme Court concluded that "a quorum of a public body using serial electronic communication to deliberate toward a decision or to make a decision on any matter over which the public body has supervision, control, jurisdiction, or advisory power violates the state's open meeting law." *Id.* at 778. The court noted, however, that in the absence of a quorum, members of a public body could privately discuss public issues or lobby for votes without running afoul of the state's open meeting law. If a quorum is present, or is "gathered by electronic communication," the body must abide by the public meeting requirements.

Although *Del Papa* involved a situation where deliberations of public interest were conducted via facsimile transmission, the court's repeated reference to "electronic communications" strongly implies its holding and reasoning apply to e-mail transmissions as well.

Utah

Utah law provides that meetings of public bodies must be open to the public unless a specific statutory exception applies. Utah Code § 52-4-2 defines "meeting" under this general rule as: "the convening of a public body, with a quorum present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power." In addition, Utah Code § 52-4-7.8 specifically refers to "electronic meetings" and reads:

> (b) "electronic meeting" means a public meeting convened or conducted by means of a telephonic, telecommunications, or computer conference.
>
> (c) "electronic notice" means electronic mail or fax.
>
> * * *
>
> (2) A public body may, by following the procedures and requirements of this section, convene and conduct an electronic meeting.

Public notice of the electronic meeting must be provided by either posting written notice at the "anchor" location of the meeting or providing written or electronic notice to at least one newspaper of general circulation and a local media correspondent.

Because Utah's open meeting laws specifically state a "meeting" may consist of a quorum of a public body, "whether in person or by means of electronic equipment," it may be argued that e-mail communications by public bodies are subject to the open meeting provisions.

Virginia

Virginia's Freedom of Information Act ("Act") provides:

> By enacting this chapter, the General Assembly ensures the people of the Commonwealth ready access to records in the custody of public officials,

> and free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or public official specifically elects to exercise an exemption provided by this chapter or any other statute, every meeting shall be open to the public, and all public records shall be available for inspection and copying upon request.

VA. CODE ANN. § 2.1-340.1.

The Act goes on to state that the public records and open meetings provisions are to be liberally construed, while exceptions should be narrowly read. With regard to "electronic communication meetings," the Act reads:

> It shall be a violation of this chapter for any political subdivision or any governing body, authority, board, bureau, commission, district or agency of local government or any committee thereof to conduct a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled. Nothing in this section shall be construed to prohibit the use of interactive audio or video means to expand public participation.

VA. CODE ANN. § 2.1-343.1.

Statutory law in Virginia therefore expressly prohibits the use of e-mail, telephonic, or video means to conduct meetings where the members of the public body are not physically present. Video cameras and telephones are permitted to provide expanded coverage of a meeting to the public. In addition, video and telephonic meetings may be held if a quorum of a public body is physically assembled at one location, and additional members participate in the meeting through telephonic means, provided that such participation is available to the public. No more than 25 percent of all meetings held annually may be conducted by telephonic or video means.

Factors to Consider When Using E-mail to Discuss Public Business

Most states construe their open meetings laws broadly, and the exceptions to those laws narrowly. An example of this is Kan. Att'y Gen. Op. No. 95-13, 1995 WL 40761, that found school board members in violation of the state sunshine law when a quorum of board members simultaneously engaged in board business through computer terminals. A subsequent opinion of the Kansas Attorney General found that a communication tree used to poll board members by e-mail would also violate Kansas law. School districts should examine the law in their jurisdiction to determine whether case or statutory law has been implemented that specifically addresses the use of e-mail, and whether e-mail communications may constitute "meetings" that trigger the open meeting requirement. An example of a law that limits the usually broad definition of a public record is Col. Rev. Stat. Ann. § 24-6-402. 2(d)(III)(West, 1998). This states that only e-mail used "to discuss pending legislation or other public business" is subject to the state's sunshine law, which also does not cover e-mail communications on other topics.

As in cases where a series of telephone calls made between members of a public body to conduct public business have been found to violate open meeting laws, a series of e-mail communications between members of a public body on a matter of public interest may violate a requirement that an agenda be posted. These may also transgress the open meeting laws, if the public is denied the opportunity to observe the meeting. Further, the content of the e-mail correspondence is critical in assessing whether the matter should be open to public participation. For instance, purely personal e-mail correspondence on a subject not under the board's subject matter jurisdiction would not invoke open meeting laws because it does not involve a matter of public business.

PUBLIC RECORDS

As with open meeting laws, all 50 states have enacted public records laws that allow the public access to matters of public concern. Whereas open meeting laws afford the public an opportunity to participate in meetings held to discuss or deliberate on public business, public records laws provide the public access to documents related to public business. The central issue that arises with the increasing use of e-mail within school districts is whether an e-mail exchange constitutes a public record that must be preserved, and made available to the public upon request. A writer for the Seattle Times offered the following perspective in a February 1999 editorial:

> [J]ournalists today are finding that some electronic communications between public officials are falling into information black holes.
>
> The biggest concern is electronic mail. An increasing number of public officials have personal computers, Internet hookups, and e-mail capabilities. With just a few clicks of a mouse, policy decisions can be made by members of city councils or school boards from the convenience and privacy of their homes without advanced planning or public notice . . . .
>
> With e-mail use spreading rapidly, the state Legislature should update public disclosure and open meeting laws to reflect technological innovations in the way government officials communicate with each other and the public. One goal should be uniform methods of recording and archiving e-mail messages sent on government computers.

Government Online: Keep it Open, Public, Editorial, Seattle Times (February 11, 1999).

As this issue intensifies with the increasing use of e-mail by public bodies, state courts and legislatures will likely address the matter, and clarify the law as it relates to electronic correspondence. Public records laws from representative states are examined below to provide an overview of the relationship between the use of electronic mail and public records laws.

California

California's Public Records Act provides:

> Public records are open to inspection at all times during the office hours of the state or local agency, and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

CAL. GOV'T CODE § 6253.

"Public records" under the above provision are defined as: "[A]ny writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics . . . ." CAL. GOV'T CODE § 6252(e).

In addition, a "writing" is defined as:

> [H]andwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic and punched cards, discs, drums, and other documents.

CAL. GOV'T CODE § 6252(f).

As with public records laws in all states, the California Public Records Act defines "writings" that are considered public records broadly, and e-mail correspondence is likely a "writing" subject to disclosure if it relates to a matter of public business, and is not specifically exempt under law. The numerous exemptions to the general provision requiring disclosure of public records include, but are not limited to: 1) preliminary drafts, notes, or memoranda not retained by the public agency in the ordinary course of business, provided the interest in withholding the records clearly outweighs the public's interest in disclosure; (2) records related to pending litigation; (3) personal, medical, or other files that would constitute an unwarranted invasion of personal privacy; and (4) test questions, scoring keys, and other examination data used to administer an academic examination. CAL. GOV'T CODE § 6254.

California school districts are governed by statutory provisions and regulations of the Department of Education that classify records made by public employees, and specify the requirements for the maintenance, storage, and destruction of such records. E-mail records pertaining to public business should be treated in accordance with these provisions for maintenance and destruction of records. These records may either be archived on a school database or printed and saved as hard copies. California law specifies that, "computer data shall be provided in a form determined by the agency." If a school district receives a request for an e-mail that falls within the statutory definition of a public record, it may produce a copy of the e-mail on floppy disk or by printing out the requested information. It may also e-mail the document to the requester.

Proposed legislation that would *require* a public agency that stores public records in an electronic format to make the information available upon request in electronic format has been vetoed in both the 1997-1998 and 1999-2000 legislative sessions. Assembly Bill 179 was vetoed by the California Governor in the 1997-1998 session because it would result in an excessive burden on government agencies. In addition, Senate Bill 1065 was vetoed in January 2000 because many of California's computer systems did not yet have the capacity to implement the bill's provisions. Based on the history of proposed legislation in this area, and the fact that the most recent legislation was vetoed on non-substantive grounds, it is likely additional legislation regarding electronic production of electronically-stored public records will be proposed again in the near future.

Florida

Florida law defines "public records" that are subject to public disclosure, unless a specific exemption applies, as:

> [A]ll documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

FLA. STAT. ANN. § 119.011(1).

The Florida Attorney General has opined that an e-mail transmission is a "public record." Fla. Att'y Gen. Op. 96-34. Florida law also provides: "Access to computerized public records is allowed through use of programs currently in use by the public official responsible for maintaining such records." FLA. STAT. ANN. § 119.07. Based on the foregoing, e-mail transmissions sent and/or received by school district employees pursuant to law or in connection with official business must be retained by the district and produced as a public record upon request.

In *Amendments to Rule of Judicial Administration 2.051*, 651 So.2d 1185 (1995), the Florida Supreme Court approved amendments to Florida's Rules of Judicial Administration. Although the rules of judicial administration do not apply to school districts, the court's discussion of the impact of electronic mail on the rules offers guidance for examining the relationship between e-mail correspondence and the state's public records laws. In describing the increasing use of e-mail in the judicial branch, the court stated:

> E-mail transmissions are quickly becoming a substitute for telephonic and printed communications, as well as a substitute for direct oral communications . . . . The fact that information made or received in connection with the official business of the judicial branch can be made or received electronically does not change the constitutional and rule-mandated obligation of judicial officials and employees to direct and channel such official business information so that it can be properly recorded as a public record. The obligation is the same whether the information is sent as a letter or memo by hard copy or as an e-mail transmission.

Id. at 1186-1187.

Similarly, because e-mail transmissions fall within the provisions of Florida's public records laws, those e-mails related to official business must be properly recorded and accessible to the public upon request.

Virginia

As previously noted, Virginia's Freedom of Information Act provides that if no exemption exists, "every meeting shall be open to the public and all public records shall be available for inspection and copying upon request." "Public records" are broadly defined under the Act as:

> [A]ll writings and recordings which consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording, or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in possession of a public body or its officers, employees, or agents in the transaction of public business.

VA. CODE ANN. § 2.1-341.)

Because the above definition includes electronic recordings, regardless of their physical form or characteristics, as "public records," e-mail correspondence between school board members would fall within the purview of Virginia's Freedom of Information Act.

CONCLUSION

The legal impact of the use of e-mail on open meeting laws and public records laws varies from state to state. The increasing use of electronic technology will continue to raise legal issues, and prompt state legislatures to revise their laws. In many states, the effect of open meeting and public records laws on virtual conferencing, Internet chat rooms, and instant messaging systems has not been clearly addressed. An e-mail copied to all fellow board members or the use of interactive technology to exchange or communicate opinions on a subject within the board's jurisdiction while outside of the public meeting may trigger a violation of the state open meeting laws.

School districts should familiarize themselves with state laws concerning how records are classified, which records must be preserved, and when records may be destroyed. Local policies and procedures should be reviewed in light of available technology to retrieve documents, even when the recipient or sender of a message has deleted it.

Districts must be cognizant that every e-mail communication is potentially a disclosable public record. When in doubt about whether a proposed e-mail message would be classified as a public record available on request to any member of the public, board members and senior members of the administration should consult counsel prior to sending the message. School board members must be aware of the legal implications of electronic mail transmissions, and should be cautious about discussing matters under the subject matter jurisdiction of their board via e-mail, lest such communications be determined to be an illegal meeting. Many state laws require that any official business action taken in violation of a state's sunshine law be nullified. It is in the best interest of school districts to act preemptively in expanding awareness about the legal implications of corresponding on matters of public interest through electronic mail.

If an e-mail transmission is requested as a public record, school districts should first look to state law to determine whether the communication at issue is, in fact, a "public record." Because "public records" are broadly defined, and exemptions to the requirement that public records be disclosed are narrowly interpreted, local agencies should treat all e-mail correspondence that does not clearly fall within an exemption as though it may be subject to disclosure.

E

Doe v. Santa Fe:
The Latest on Prayer in the Schools

NSBA Council of School Attorneys
2000 Advocacy Seminar
October 12-14, 2000

Presented by Shellie D. Hoffman, Director of Legal Services
TEXAS ASSOCIATION OF SCHOOL BOARDS

Doe v. Santa Fe:
The Latest on Prayer in the Schools

Presented by Shellie D. Hoffman, Director of Legal Services
Texas Association of School Boards

I. The First Amendment and Public Schools

A. A school district may neither establish religion nor prohibit the free exercise of religion.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ." U.S. Const., amend. I. This applies to school districts as political subdivisions of the state through the Fourteenth Amendment. *Engel v. Vitale*, 370 U.S. 421 (1962).

1. The Establishment Clause – freedom *from* religion

The Supreme Court has evaluated Establishment Clause claims under three tests:

The *Lemon* Test

To avoid a violation of the Establishment Clause, a practice must satisfy all three prongs of the *Lemon* test:

a. Does the practice have a legitimate secular purpose?

b. Is its primary effect one that neither advances nor inhibits religion?

c. Does it avoid excessive entanglement with religion?

Lemon v. Kurtzman, 403 U.S. 602 (1971).

The Coercion Test

School-sponsored religious activity is also analyzed to determine whether the practice has a coercive effect on students. *Lee v. Weisman*, 112 S. Ct. 2649 (1992). In *Lee*, the Supreme Court found that school officials were impermissibly directing the performance of a formal religious exercise and therefore coercing participation by objectors. In *Doe v. Santa Fe*, the Court stated that students may not be forced to make the difficult choice between whether to attend football games or to risk facing a personally offensive religious ritual. *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 120 S. Ct. 2266 (2000).

The Endorsement Test

"In cases involving state participation in religious activity, one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of prayer in public schools." *Santa Fe. Indep. Sch. Dist. v. Jane Doe*, 120 S. Ct. 2266 (2000) (citing *Wallace v. Jaffree*, 472 U.S. 38 (1985)); *see also Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995) (O'Connor, J., concurring in part and concurring in judgment).

2. **The Free Exercise Clause – freedom *of* religion**

   a. The Free Exercise Clause protects the right to believe and profess whatever religious doctrine one desires.

   b. The Free Exercise Clause prevents the government from passing laws or establishing practices that specifically target adherents of particular faiths. The government may, however, adopt and apply neutral, generally applicable laws and practices.

Employment Div., Dep't of Human Resources v. Smith, 110 S. Ct. 1595 (1990).

B. Schools do not have to be "religion-free zones."

"Nothing in the First Amendment converts our public schools into religion-free zones, or requires all religious expression to be left behind at the schoolhouse door. While the government may not use schools to coerce the consciences of our students, or to convey official endorsement of religion, the public schools also may not discriminate against private religious expression during the school day. Religion is too important in our history and our heritage for us to keep it out of our schools. . . [I]t shouldn't be demanded, but as long as it is not sponsored by school officials and doesn't interfere with other children's rights, it mustn't be denied." President Clinton, July 12, 1995.

C. What religious activities may take place at school?

The U.S. Secretary of Education, Richard Riley, has identified the following permissible practices. Public school students can:

1. Pray individually, such as before meals or tests.

2. Engage in nondisruptive individual or group prayer in cafeterias or hallways.

3. Participate in events with religious content, such as "See You at the Flagpole," on the same terms as students may participate in other noncurricular activities.

4. Discuss and debate with peers about religious beliefs, as long as such discussion does not harass other students.

5. Study religion as part of curriculum for historical purposes.

6. Express their religious beliefs in school assignments.

7. Distribute religious literature on the same terms as students are permitted to distribute other literature that is unrelated to school curriculum or activities.

8. Display religious messages on items of clothing, subject to the same rules as comparable messages.

II. Prayer During the School Day

A. What is Prayer?

1. A "solemn avowal of divine faith and supplication for the blessings of the Almighty" is a "prayer" of a religious nature. *Engel v. Vitale*, 370 U.S. 421 (1962).

2. "Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object." *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982).

B. Private Student Prayer

1. Nothing in the Constitution prohibits any public school student from voluntarily praying at any time before, during or after the school day. *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 120 S. Ct. 2266 (2000).

2. Students may gather to pray when they are not engaged in instruction or other school activities, subject to the same rules of order that apply to other student activities. *Wallace v. Jaffree*, 472 U.S. 38 (1985). Thus, "See You at the Flagpole" meetings are permissible, as long as participants do not violate school rules of order.

C. School-sponsored Prayer

1. A school may not have a student read a prayer over a loudspeaker system at the beginning of a school day, even if the student chooses the prayer. *School Dist. of Abington v. Schempp,* 374 U.S. 203 (1963).

2. Prayer given by a student volunteer or a teacher at the beginning of the school day violated the First Amendment to the U.S. Constitution. *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982).

3. A law that permitted public school students to initiate nonsectarian, nonproselytizing prayer at various compulsory and noncompulsory school events was held unconstitutional (except as to prayer at graduation; see discussion below). The statute had the effect of advancing religion and could be seen as coercive in nature. It could be read to allow nonstudents to lead invocations and benedictions, it allowed prayer during instructional hours, and it did not have a sufficient secular purpose. *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996).

D. Moments of Silence

1. In 1985, the U.S. Supreme Court invalidated a state statute calling for "a period of silence . . . for meditation or voluntary prayer" at the beginning of the day because the statute lacked any secular purpose. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

2. On the other hand, the Eleventh Circuit upheld Georgia's Moment of Quiet Reflection in Schools Act. The Act clearly stated that the "moment of quiet reflection . . . is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day." The court concluded that the Act had a secular purpose and satisfied the other prongs of the *Lemon* test; thus the moment of silence did not violate the Establishment Clause. *Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997).

III. Prayer at School Activities

A. Student-led Prayer

1. *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 120 S. Ct. 2266 (2000).

Santa Fe ISD had a policy that provided for a student-selected, student-given invocation or message to be delivered during pre-game ceremonies of home football games. The Fifth Circuit Court of Appeals held that, outside the graduation context, a policy allowing for student-led, student-initiated, invocations and benedictions cannot survive.

The United States Supreme Court agreed to review the limited question of whether Santa Fe ISD's policy permitting student-led, student-initiated prayer at football games, recited over the public address system, violates the Establishment Clause. The Supreme Court held that a school district may not allow school-sponsored, student-led prayers or other religious messages to be delivered over the public address system at football games. Citing its own precedent, the Court explained that there is a "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clause protect." Because the invocations in Santa Fe ISD were authorized by official policy and took place at government property, at government-sponsored events, and under the supervision of school employees, the Court refused to conclude that the pregame invocations could be considered "private speech."

The Court was also troubled by the religious content of the invocations and by the possibility that the message would be perceived as endorsed by the school district. "Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." Moreover, the Court added, given the school district's history, it was reasonable to infer that the purpose of the policy was to preserve a "state-sponsored religious practice." Although the Court conceded that attendance at football games is not mandatory for most students, many—such as cheerleaders, members of the band, and team members—must attend. And other students, the Court added, should not be forced to choose between attending and facing what might be a personally offensive religious ritual.

The Court also took issue with the school district's election system. By establishing this mechanism, it determined, the district entrusted "the inherently nongovernmental subject of religion to a majoritarian vote." Such a system threatens to coerce those who do not wish to participate in a religious exercise, and therefore, it is unconstitutional. In conclusion, the Court held that the school district's policy "is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Santa Fe Indep. Sch. Dist. v. Jane Doe,* 120 S. Ct. 2266 (2000).

2. In the wake of *Santa Fe*, the Supreme Court vacated and remanded an Eleventh Circuit decision regarding student-initiated prayer. An Alabama statute allowed nonsectarian, nonproselytizing student-initiated prayer, invocations, and benedictions during compulsory or noncompulsory school-related assemblies, sporting events, graduation ceremonies, and other school-related events. The Eleventh Circuit held that genuinely student-initiated religious speech must be permitted without oversight or supervision by the school district, subject only to the same reasonable time, place, and manner restrictions applied to all other student speech. *Chandler v. James*, 68 U.S.L.W. 3391 (U.S. June 26, 2000) (No. 99-935) (granting certiorari, vacating, and remanding 180 F.3d 1254 (11th Cir. 1999)).

B. Employee Participation in Student Prayer

1. School district employees may not lead, encourage, promote, or participate in prayer with or among students during curricular or extracurricular activities, including before, during, or after school-related sporting events. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

2. Nothing precludes a school employee from treating students' beliefs and practices with deference and respect; however, an employee crosses the line between respect for religion and endorsement of religion if the employee takes actions that manifest approval of and solidarity with student religious exercises. *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995).

3. According to the Supreme Court, "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

4. The Second Circuit Court of Appeals ruled in *Marchi v. Board of Cooperative Educ. Services of Albany*, 173 F.3d 469 (2d Cir. 1999), that a school district did not violate the free speech rights of a teacher when it prohibited him from sharing his faith and praying with students. The court quoted the Supreme Court's earlier acknowledgment that the interest of the state in avoiding an Establishment Clause violation may justify an abridgement of free speech otherwise protected by the First Amendment.

C. Private Prayer

1. Can any student-initiated prayer survive constitutional challenge?

2. Where do audience free speech rights and school sponsorship concerns collide?

IV. Prayer at Graduation

A. School-sponsored Ceremonies

1. The United States Supreme Court narrowly overturned a Rhode Island school district's policy allowing principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations and provide them with guidelines to ensure that the content was nonproselytizing and nonsectarian.

   The majority held that the school district's involvement with religious activity in this case was pervasive to the point of creating a state-sponsored and state-directed religious exercise in a public school. The principal directed and controlled the content of the prayer, decided whether or not to have a prayer at the ceremony, and chose which clergy member would give the prayer while providing the rabbi guidance as to the content of the prayer. *Lee v. Weisman,* 112 S. Ct. 2649 (1992).

2. The Fifth Circuit Court of Appeals has held that the board may permit the graduating senior class, with the advice and counsel of the senior class sponsor, to choose student volunteers to deliver nonsectarian, non-proselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 2950 (1993); *Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996).

3. Two other circuits have disagreed with the Fifth Circuit on this issue. *See Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated,* 115 S. Ct. 2604 (1995); *American Civil Liberties Union v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996).

4. The Ninth Circuit upheld a school policy allowing a student to be selected to give a neutral "message" at school assemblies. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998). The decision was subsequently vacated as moot by the en banc court. *Doe v. Madison Sch. Dist, No. 321*, No. 97-35642, 1999 WL 317050 (9th Cir., May 19, 1999).

5. The Eleventh Circuit Court of Appeals upheld a policy permitting seniors to elect to have unrestricted student-led messages at the beginning and end of graduation ceremonies. In the court's opinion, the student messages made possible by this policy need not be constrained because the messages would constitute purely private speech. *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (en banc), *petition for cert. filed,* 68 U.S.L.W. 3741 U.S. May 22, 2000) (No. 99-1870).

B. Private Baccalaureate Services

1. Depending on the terms of a school district's equal access policy, students or outside groups (like churches) may be allowed to hold private baccalaureate ceremonies in school facilities. *Shumway v. Albany County Sch. Dist. No. 1 Bd. of Educ.*, 826 F. Supp. 1320 (D. Wyo. 1993).

2. Once a school board formally dissociated itself with a baccalaureate service, the service could be held in the school auditorium. *Randall v. Pegan,* 765 F. Supp. 793, 796 (W.D.N.Y. 1991).

3. A baccalaureate ceremony could be held in a school auditorium, but the school district could not sponsor the ceremony and had to take steps to ensure that students, parents, and members of the community would understand that the ceremony was not affiliated in any way with the

school. *Verbena United Methodist Church v. Chilton County Bd. of Educ.*, 765 F. Supp. 704, 715 (M.D. Ala. 1991).

V. Prayer at School Board Meetings

A. Legislative Prayers (1983-1999)

1. In 1983, the U.S. Supreme Court upheld the practice of the Nebraska Legislature in opening each session with a prayer by a chaplain paid by the state with the legislature's approval. The court acknowledged that the practice of opening sessions of legislative and other deliberative bodies "is deeply embedded in the history and tradition of this country" and has "coexisted with the principles of disestablishment and religious freedom" from colonial times to the present. In fact, the Bill of Rights, including the First Amendment, was adopted just three days after the First Congress authorized the appointment of paid chaplains. According to the court, the actions of the First Congress reveal its members' intent as to the meaning of the Establishment Clause; apparently, the members saw legislative prayers as no real threat to the Establishment Clause. The court concluded, therefore, that the practice did not violate the Establishment Clause. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983).

2. In 1998, a federal district court in California held that a school board's practice of opening its meetings with prayer did not violate the Establishment Clause. The court stated that although a school board conducts the business of the public schools, a board meeting does not give rise to the heightened concerns regarding the susceptibility of school children to indoctrination or peer pressure. The court relied on the fact that "a [b]oard meeting is a meeting of adults with official business and policy making functions." The court rejected the argument that the presence of some students at the meeting required the issue to be analyzed like other issues involving religion in the school setting. *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp.2d 1192 (C.D. Cal. 1998).

3. The Tenth Circuit Court of Appeals upheld a city council's refusal to allow a citizen to pray on the ground that his proposed prayer (which called on public officials to cease the practice of using religion in public affairs) fell outside the genre of "legislative prayers" approved in *Marsh* because it was proselytizing (in its effort to convert the audience to the citizen's belief in the sacrilegious nature of governmental prayer) and disparaged those who believed legislative prayer to be appropriate. *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998).

B. The Sixth Circuit (1999)

1. In early 1999, the Sixth Circuit Court was confronted with the question of whether the prayers at school board meetings were more like prohibited

"school prayers" or permissible "legislative prayers." The court noted that students often appeared at the board meetings to speak during the public comment portion of the meeting. The board also addressed student grievances during its meetings. In addition, a student representative regularly sat on the board, and the board frequently invited students to its meetings to receive awards and give a few remarks to the audience. The court rejected the argument that *Marsh* should be applied to allow prayer and found the school prayer cases to be more applicable because the "school board meetings are an integral part of the Cleveland public school system" – the meetings were conducted on school property by school officials and students regularly attended and actively participated in the discussions of school matters. The court ultimately held that the practice of opening school board meetings with prayer violated all three prongs of the *Lemon* test and, therefore, the Establishment Clause. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999).

F

2000 ADVOCACY SEMINAR

NSBA COUNCIL OF SCHOOL ATTORNEYS

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THE EQUAL ACCESS ACT AND RELATED ISSUES

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The Wigwam Resort
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◆

1. The Equal Access Act, 20 U.S.C. §§4071-74[*]

A. The Act provides that:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political philosophical or other content of the speech at such meetings.

The key words or phrases in this statement are:

1. secondary school - a secondary school means a school which provides secondary education as determined by state law (Section 4072[1]).
2. federal financial assistance - the Act does not define this, it should be applied liberally.
3. limited open forum - it is present whenever a secondary school grants an offering to or an opportunity for one or more non-curriculum related student groups to meet on school premises during non-instructional time (Section 4071[b]).
4. meeting - includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum (Section 4072[3]).

   The Court in Widmar v. Vincent expressly noted that its holding did not necessarily apply to public secondary schools (454 U.S. 263 at 274, n. 14).
5. non-instructional time - is the time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends (Section 4072[4])
6. a fair opportunity exists where the school uniformly provides that:
   - a. the meeting is voluntary and student-initiated
   - b. the school district does not sponsor the meeting

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[*] Portions of this outline are taken from several articles contained in the NSBA Council of School Attorneys Publication Religion, Education and The Constitution, copyright 1994. The articles include, "The Equal Access Act And Student Religious Groups", by Stephen S. Russell and "Use of Facilities By Outside Religious Groups", by John S. Aldridge and Gwendolyn Gregory.

c. employees of the district are present at meeting only in a non-participatory capacity

d. the meeting does not materially and substantially interfere with the orderly conduct of educational activities

e. non-school persons cannot direct, control conflict or regularly attend the activities of student groups (See Section 4071(C)[1] through [5].

B. It is generally assumed that the Act was passed by Congress to implement the decision of the U.S. Supreme Court in Widmar v. Vincent, 454 U.S. 263 (1981). In Widmar, the U.S. Supreme Court held that a university that had created a limited open forum could not deny that forum to a student group that wanted to use it for prayer and religious discussion. It is also generally thought that the Act was passed to overrule the Court decisions in Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982) and Brandon v. Guilderland Board of Education, 635 F.2d 971 (2nd Cir. 1980), both of which held that student religious groups could not meet on school premises without violating the Establishment Clause of the First Amendment.

II. Equal Access Cases

A. Student Coalition for Peace v. Lower Merion School District, 776 F.2d 431(3rd Cir. 1985) on remand 633 F.Supp 1040 (E.D.Pa 1986). Student group dedicated to nuclear disarmament requested permission to use an athletic field for a "peace fair". Permission was denied by both the high school principal and the board of education. The district court and the Court of Appeals for the Third Circuit found no First Amendment violation. However, the Third Circuit did hold that the students could bring a private cause of action for an injunction under the Equal Access Act. It also held that student groups wishing to invite non-students onto school property are protected by the Equal Access Act if the school's limited open forum encompasses non-student participation in student events as long as those students do not "direct, conduct, control or regularly attend such activities".

On remand, the district court concluded that the student group was entitled to use the high school gymnasium to hold its rally. The court held that there was no evidence to conclude that the field sought was a limited open forum, a limited open forum was created in the boys' gym.

B. Thompson v. Waynesboro Area School District, 673 F.Supp 1379 (M.D.Pa 1987). Court held that the Equal Access Act did not apply to the distribution of a religious newspaper on school property and that this distribution did not constitute a meeting under the Act.

C. Perumal v. Saddleback Valley Unified School District, 198 Cal App 3d 64, 243 Cal Rptr 545 (Cal Ct. App 1988). Student religious group known as "New Life" wanted to distribute flyers on school grounds and to advertise in the school yearbook. The school district had a policy prohibiting off campus groups from functioning or advertising on campus. The court ruled that the district had a closed forum and that the Equal Access Act did not apply. The court also stated that an advertisement in the student yearbook was not a "meeting" under the Act.

D. Garnett v. Renton School District No. 403, 865 F.2d 1121, modified 874 F.2d 609 (9th Cir. 1989), vacated 496 U.S. 226 (1990), 772 F.Supp 531 (D Wash 1992) rev'd 987 F.2d 641 (9th Cir 1993). In this district, classrooms were available for use by students in co-curricular activities. The district's policy permitting these co-curricular activities specifically provided that the district did not maintain a limited open forum. Garnett and other students wanted to use a classroom for weekday morning meetings in which they would discuss religious and moral issues, read the Bible and pray. Their request was denied by the district on the grounds that the club was not curriculum-related and that allowing the meetings would violate the Establishment Clause.

The district court held that allowing the students to meet would violate the Washington State Constitution and that the Equal Access Act did not preempt the Washington State Constitution.

Article I, Section 2 of the Washington State Constitution provides, in pertinent part:

> "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."

Article IX, Section 4 provides:

> "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

On appeal, the Ninth Circuit reversed the district court. The court concluded that the Washington State Constitution could not be used to circumvent the Equal Access Act, and that state laws cannot abridge rights granted under federal law. The court noted that in Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990) the Supreme Court found a broad legislative purpose suggesting that Congress intended to preempt state law. Because of the board federal law, the students were entitled to meet.

E. Board of Education of the Westside Community Schools v. Mergens, 497 U.S.226 (1990). The plaintiff asked the high school principal to form a Christian Club. She requested the same meeting privileges as other groups, although the club would not have a sponsor. The club would sponsor Bible reading and discussion, fellowship and prayer. Both the administration and the school board denied the request on the ground that club meetings would violate the Establishment Clause.

While the district court ruled in favor of the district, both the United States Court of Appeals for the Eighth Circuit and the United States Supreme Court disagreed, holding that not all the student groups involved were curriculum-related and, as a result, the high school had a limited open forum policy. Key to the Court's decision was Justice O'Connor's broad interpretation of the term "non-curriculum related student group" under the Act. According to Justice O'Connor that term means:

> . . . any student group that does not directly relate to the body of courses offered by the

> school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit.

Justice O'Connor also stated that this definition was a common sense interpretation of the Act, consistent with Congress' intent to provide a low threshold for triggering the Act's requirements. She noted by example that a French club would directly relate to the curriculum if a school taught French as a regularly offered course or planned to do so in the near future. Similarly, a student government group would be curriculum related if it addressed concerns, solicited opinion, and formulated proposals pertaining to the body of courses offered by the school. Participation in a school band or orchestra would be directly related to the curriculum if it were required for the band or orchestra classes Such groups would not trigger the Act's obligations

By contrast, unless a school district can show that groups such as a chess club, stamp collecting club or various community service clubs fall within the Court's definition of directly relating to the curriculum, they would be non-curriculum related student groups. By allowing such groups to meet, a district creates a limited open forum and triggers the provisions of the Equal Access Act. In this particular case, the Court held that groups such as the subsurfers, the chess club and peer advocates, a service group working with special education students, were non-curriculum related student groups. The Court went on to hold that the provisions of the Act itself did not violate the Establishment Clause as interpreted under the traditional test in Lemon v. Kurtzman, 403 U.S. 602 (1971).

Since the Equal Access Act has been held to be constitutional, any school district wishing to avoid the requirements of the Act must be able to prove that all its student groups are curriculum-related under the test set forth by Justice O'Connor. That means that the subject matter of a group is actually taught, or will soon be taught in a regularly offered course; the subject concerns the body of courses as a whole; participation in the group is required for a particular course, or participation in the group results in academic credit. If one of those categories cannot be satisfied, the activities of the non-curriculum related group would cause the Act to become applicable.

F. Hoppock v. Twin Falls School District No. 411, 772 F.Supp 1160 (D.Idaho 1991) Students wanted to form a Christian religious club and meet at school during non-instructional time. Students in the district were permitted to form and join various non-curriculum related student groups which met after hours on school premises. The school board denied the student's request. Like the Garnett case, the district court ruled that the Idaho Constitution could not be used to thwart the operation of the Equal Access Act.

G. Ceniceros v. Board of Trustees of San Diego Unified School District, 66 F.3d 1535 (9th Cir 1995). Student asked the vice principal if she could form a student religious club that would meet in an empty classroom during the lunch period. Several other voluntary non-curriculum related student groups

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met during the lunch period. In its decision, the United States Court of Appeals for the Ninth Circuit held that the district's high school lunch period was "non-instructional time" for purposes of triggering the requirements of the Equal Access Act.

H. Hsu v. Roslyn Union Free School District, 85 F.3d 839 (2nd Cir. 1996). The United States Court of Appeals for the Second Circuit held that recognition by a school district of a student Bible club, the constitution of which required that president and vice president be professed Christians, did not violate the Establishment Clause. Court held that recognition by district, in compliance with Equal Access Act would serve the purpose of preventing discrimination against religious and other types of speech.

III. Use of School Facilities By Outside Religious Groups

A. Southside Estates Baptist Church v. Board of Trustees, 115 So2d 697 (Fla. 1959). District permitted a number of different religious groups to temporarily use various school buildings on Sunday for holding services pending completion of construction of their churches. The Florida Supreme Court held that such temporary use did not violate the Florida Constitution. The court also held that the temporary use of school property did not violate the Establishment Clause of the First Amendment.

B. O'Hara v. School Board of Sarasota County, 432 So2d 697 (Fla. 1983). School district leased one of its facilities to a Catholic mission for religious services during non-school hours on weekends. The court upheld the practice based on the following key facts:

1. The district had policies and regulations permitting such use.
2. This use had not interfered with the operation of the school system.
3. There was no direct expenditure of public funds, since all expenses such as cleaning utilities were paid by the church.
4. The use was not permanent. The church had a definite date set for the opening of its new building as well as a definite date for the termination of the use of the school building.

C. Resnick v. East Brunswick Township, Bd. of Education, 77 N.J. 88, 389 A2d (N.J. 1978). District was sued by plaintiff alleging that the use of school facilities by religious groups violated New Jersey law as well as the U.S. Constitution. The New Jersey Supreme Court held that it was permissible for religious groups to sue public school facilities on a temporary basis for a fee when the religious use occurred at a time when the facilities were not required for regular educational activities. The court held that there was no statute which prohibited the use of school building for religious services when school was not in session, and that the board of education had board discretion to permit this use. However, the court did note that the New Jersey State Constitution did prohibit any lease arrangement between a board and religious groups which did not fully reimburse the out of pocket expense directly attributable to non-school use.

With respect to the argument that the district had violated the Establishment Clause in making its facilities available for use by religious groups, the New Jersey Supreme Court applied the traditional three part test set forth by the U.S. Supreme Court in Lemon v. Kurtzman, 402 U.S. 602

(1971). Under this test, the court analyzed the district's actions to determine if:

1. The actions had a secular purpose.
2. Their principle effect was none that neither advanced nor inhibited religious and
3. They did not foster an excessive government entanglement with religion.

Using this test, the court held that the leases involved had a secular purpose because they enhanced the use of school facilities for the benefit of district residents. Second, the court held that the temporary use of school facilities by religious groups did not have the primary effect of advancing religion. Lastly, because no significant school administrative functions were involved in such usage and no supervision was required to insure that religion did not affect secular instruction there was no excessive governmental entanglement with religion.

D. Gregoire v. Centennial School District, 907 F2d 1366 (3rd Cir. 1990). The United States Court of Appeals for the Third Circuit invalidated a school district policy which limited access to organizations groups and activities which are compatible with the school's mission and which did not permit the use of high school facilities for religious services and which denied the use of high school facilities for religious services and imposed a ban on the distribution of religious literature. The Court found that school facilities were a designated open public forum and that a religious organization could not be limited to religious discussion rather than religious worship.

E. Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 (2nd Cir. 1997), cert. den 118 S.Ct. 1517. Evangelical Church and pastors challenged the policy of the New York City Board of Education that no outside organization or group may be allowed to conduct religious services or religious instruction after school. However, the policy did allow the issue of school premises by outside organizations or groups after school for the purposes of discussing religious material or material which contains a religious viewpoint. In its decision the United States Court of Appeals for the Second Circuit held that the middle school in question was a limited public forum, and that the Board policy prohibiting renting of school facilities for religious worship and instruction but permitting speech from a religious viewpoint concerning secular matters was reasonable and viewpoint neutral and not in violation of the First Amendment. The court also held that the Equal Access Act was not applicable to the use of school facilities by an outside religious organization.

F. Full Gospel Tabernacle v. Community School District 27, 979 F.Supp 214 (S.D.N.Y. 1997) affd. 164 F.3d 829 (2nd Cir. 1999), cert. den 119 S.Ct. 2395. Like Bronx Household of Faith, the Second Circuit affirmed a district's exclusion of religious services and instruction in school facilities, holding that this policy was not unconstitutional viewpoint discrimination and was reasonable in light of the fact that school facilities were a limited public forum.

G. Good News Club v. Milford Central School, 202 F.3d 502 (2nd Cir. 2000) (Application for certiorari pending). The school district adopted a policy permitting the use of school facilities for any of the purposes set forth under New York law. However, the policy prohibited the use of school facilities for religious purposes. Under the policy, the district allowed organizations such as the Boy Scouts, the Girl Scouts and the 4-H Club. The Good News Club, a Christian youth organization open to children between the ages of six and twelve applied to use school facilities through a local minister. The Club takes its name from the good news of Christ's gospel and the "good news" that salvation is available through belief in Christ. A typical meeting of the group involved prayer, Bible study and games and songs with a religious theme. The purported purpose of the Club was to instruct children in moral values.

At the request of the district's counsel, the Club provided materials regarding the nature of the instruction and activities that would take place at its meetings. After reviewing the materials, the superintendent and counsel determined that the activities proposed by the Club did not involve a discussion of secular subjects from a religious perspective, "but were in fact the equivalent of religious instruction itself". Based on this the Board denied the organization's request.

In the subsequent litigation, the District Court held that the district had created a limited public forum. Finding that the policy's prohibition on the use of school facilities was reasonable and viewpoint neutral, the court dismissed the plaintiff's free speech claim. It also rejected the group's claim that it was merely teaching morals such as they Boy Scouts, Girl Scouts and 4-H Club only from a Christian perspective. On appeal, the United States Court of Appeals for the Second Circuit affirmed. Citing its previous decision in Bronx Household of Faith v. Community School District No. 10, 127 F.3d 207 (2nd Cir. 1997), the court upheld the reasonableness of the district's restrictions aimed at avoiding the appearance of endorsing or advancing a particular religion. It also agreed with the district court that the Club was doing more than teaching moral values from a religious perspective. According to the court, the Club was "focused on teaching children how to cultivate their relationship with God through Jesus Christ", and that "even under the most restrictive and archaic definitions of religion, such subject matter is quintessentially religious". Its also rejected the organizations' attempt to equate its activities with the moral instruction provided by the Scouts, stating that there was nothing in the record to indicate that any of these clubs' activities remotely approach the type of religious instruction and prayer provided by the Club.

H. Campbell v. St. Tammany's School Board, 206 F.3d 482 (5th Cir. 2000). Petitioner and the Louisiana Christian Coalition requested the use of school facilities for a "prayer meeting at which the group planned to worship the Lord in prayer and music . . . to discuss family and political issues, pray about these issues, and seek to engage in religious and Biblical instruction with regard to the issues". Like the Bronx Household case, district policy prohibited religious services and religious instruction but permitted discussions of religious material or material containing a religious viewpoint. The United States Court of Appeals for the Fifth Circuit held that the terms "religious instruction" and "religious worship" were not unconstitutionally vague, and that the district's policy was permissible. The Court stated that "[R]eligion may be either a perspective on a topic such as marriage or may be a substantive activity in itself". In the latter case, the court stated, the government's exclusion of the activity is discrimination based on content, not viewpoint.

I. Good News/Good Sports Club v. School District of City of Ladue, 28 F.3d 1501 (8th Cir. 1994), the United States Court of Appeals for the Eighth Circuit ruled that a school district's exclusion of a Good News/Good Sports Club from its facilities constituted impermissible viewpoint discrimination. The policy at issue allowed the use of school facilities outside of school hours only for athletic activities and Scout group meetings. The Eighth Circuit found that the policy's inclusion of the Scouts opened the forum to the subject of moral and character development, the same purpose for which the Good News/Good Sports Club sought access. Because it found that the only relevant difference between the Scouts and the Good News/Good Sports Club was viewpoint, the Eighth Circuit ruled that the district could not constitutionally exclude the Club from school facilities.

J. Travis v. Owego Apalachin School District, 927 F.2d 688 (2nd Cir. 1991). School district refused to allow a pregnancy counseling organization, part of "Youth for Christ", a non-profit organization, to use the school auditorium for a fundraiser with a religious theme. The district claimed that the event would violate New York Law and board policy which precluded the use of facilities by religious organizations. The district court and the Second Circuit found that because the district had allowed the use of its facilities for other fund-raising events with Christmas themes, its exclusion of a Youth for Christ group was not viewpoint neutral and was, therefore, unconstitutional.

K. Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993). U.S. Supreme Court ruled that school district violated the First Amendment rights of an evangelical church by refusing it permission to use school facilities to show a film series on family values and child rearing from a "Christian perspective". The school district's policy stated, among other things, that school premises could not be use for religious purposes. The Court ruled that the district had engaged in "viewpoint discrimination" by allowing other groups to present their views on family values but denying petitioners the right to present the subject from a religious perspective. The Court also held that because the film would be shown outside school hours, would not be sponsored by the school district, and would be open to the public, there was no realistic danger that the community would think that the district was endorsing religion.

L. Verbena United Methodist Church v. Chilton, 765 F. Supp. 704 (M.D. Ala. 1991). A church sought permission to hold a baccalaureate service in the school auditorium. In the past, the district had included a baccalaureate service as an integral part of its commencement practices, but had recently discontinued the practice. The service had included speeches, songs with a Christian theme and prayers, organized and presided over by community religious leaders. After analyzing current case law, the court held that the Establishment Clause did not require that the Board deny the church the use of the auditorium. Instead the Court required the board and the high school to take steps to disclaim any official connection to the event in their communications with students, parents, school employees and members of the community. The court required both sides to submit, prior to the event, a joint report describing the particular steps they had taken or would take to ensure that the service did not appear to students, parents or other members of the community to be affiliated in any way with the school district.

M. Randall v. Pegan, 765 F. Supp 793 (W.D.N.Y. 1991). The school district issued formal invitations in March for a district-sponsored baccalaureate service to be held in June in the school auditorium. After a complaint by the Plaintiff and the New York Civil Liberties Union that the service violated the Establishment Clause the superintendent cancelled the service. Students from the "Purposeful Life Club" then requested and received permission to hold the service. The court refused to grant a preliminary injunction barring the service, holding that because the school district had publicly disassociated itself from the service and had treated the group in the same manner as others, no Establishment Clause problems were presented. The Court noted that while board members and faculty had been invited to the service, no district personnel were involved in any aspect of the service either in their capacities as district employment or in their personal capacities.

N. Berger v. Rensselaer Central School Corporation, 982 F.2d 1160 (7th Cir. 1993). U.S. Court of Appeals for the Seventh Circuit held that classroom distribution of Gideon Bibles by representatives of Gideon International was unconstitutional. The Gideons sent two representatives once a year after learning the date with the school principal. While there was no set method of distribution, the individuals usually went to each of the five classrooms of fifth graders during school hours. After brief statements to students encouraging students to read the Bible, the students were instructed to take a Bible from a stack of Bibles placed on a table or desk. During certain years the Bibles were distributed in the auditorium or the gymnasium. Students were frequently told to take the Bibles home to their mothers and fathers and to return them if their parents objected.

O. Peck v. Upshur County Board of Education, 155 F.3d 274 (4th Cir. 1988). U.S. Court of Appeals for the Fourth Circuit upheld a school district's decision to allow non-students to disseminate Bibles on one day each school year. The district had historically allowed such non-student private groups such as Little League, Boy Scouts, Girl Scouts and the 4-H Club to distribute literature in school, although there was not formal written policy in effect.

Because the Board was sensitive to Establishment Clause concerns the Superintendent imposed a number of restrictions, including the following:

1. Private groups making the Bibles available were to be responsible for setting up the tables on which the Bibles would be displayed.
2. Bibles not picked up during the day were to be removed by these groups at the end of the day.
3. No school district employee was to participate in any activity relating to the Bible displays.
4. The tables were to be placed in a location in each location in each school (such as a library or hall) that was accessible and where students would not feel they were being pressured to take a Bible.
5. The source of the Bibles was not identified and a simple sign would read "Please feel free to take one".
6. No one was allowed at the table to encourage or pressure students to take a Bible, and no one was allowed to enter classrooms to discuss their availability.

7. The school district did not announce that Bibles were available or hold any school assembly in connection with their availability.

8. Any other religious material representing other religious beliefs would be given an equal opportunity in the same manner that the Bibles were made available to students.

Given these restrictions, the Fourth Circuit stated that the district did not violate the Establishment Clause "when it permits private entities to passively offer the Bible or other religious material to secondary school students on a single day during the year pursuant to a policy of allowing private religious and non-religious speech in its public schools" (155 F.3d at 288).

P. Liberty Christian Center v. Board of Education of the City School District of the City of Watertown, 8 F.Supp. 2d 176 (N.D.N.Y. 1998). Court held that school district would be enjoined from denying church access to cafeteria for worship when record showed that district had previously allowed similar activities such as Night of Christian Worship, which included prayers, religious songs, Bible passages and invitations to accept Christ as "Lord and Saviour".

Q. Saratoga Bible Training Institute v. Schuylerville Central School District, 18 F.Supp. 2d 178 (N.D.N.Y. 1998). Court upheld school district's decision to deny use of school auditorium by church group for lecture on the biblical origins of man. The district had a policy of not permitting outside groups to use the high school auditorium for lectures, speeches, rallies, debates or similar activities. The League of Woman Voters and political candidates had been turned down on this basis. The court held that the district's policy did not constitute viewpoint discrimination and was a reasonable time place and manner restriction.

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LEGAL CONSIDERATIONS IN MEASURES TO PROMOTE SCHOOL SAFETY

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I. PRIVACY ISSUES & FERPA

The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, is a complex federal law that protects the privacy interests of parents and students with regard to education records. It affects every public elementary and secondary school, and virtually every post-secondary institution in the country. First enacted in 1974, FERPA has been amended by Congress seven times, most recently by the Improving America's Schools Act of 1994. FERPA defines "education records" broadly to include all records, files, documents and other materials, such as films, tapes or photographs, containing information directly related to a student that an education agency or institution or a person acting for the agency or institution maintains. For example, education records include information that schools maintain on students in report cards, surveys and assessments, health unit records, special education records and correspondence between the school and other entities regarding students.

For elementary or secondary school students, FERPA restricts the release of their school records or information from their records that could identify the student ("personally identifiable information"). Before releasing such records or information to a party outside the school system, the school must obtain the consent of the student's parents unless the student is an eligible student, in which case only the student can consent to the release, or unless the release falls under one of the exceptions to the consent requirement. (A student is an "eligible student" when he or she turns 18 or enters college.) Educators are free to share information with other agencies or individuals concerning students based on their personal knowledge or observation, provided the information does not rely on the contents of the education record. Verbal referrals to other agencies based on personal

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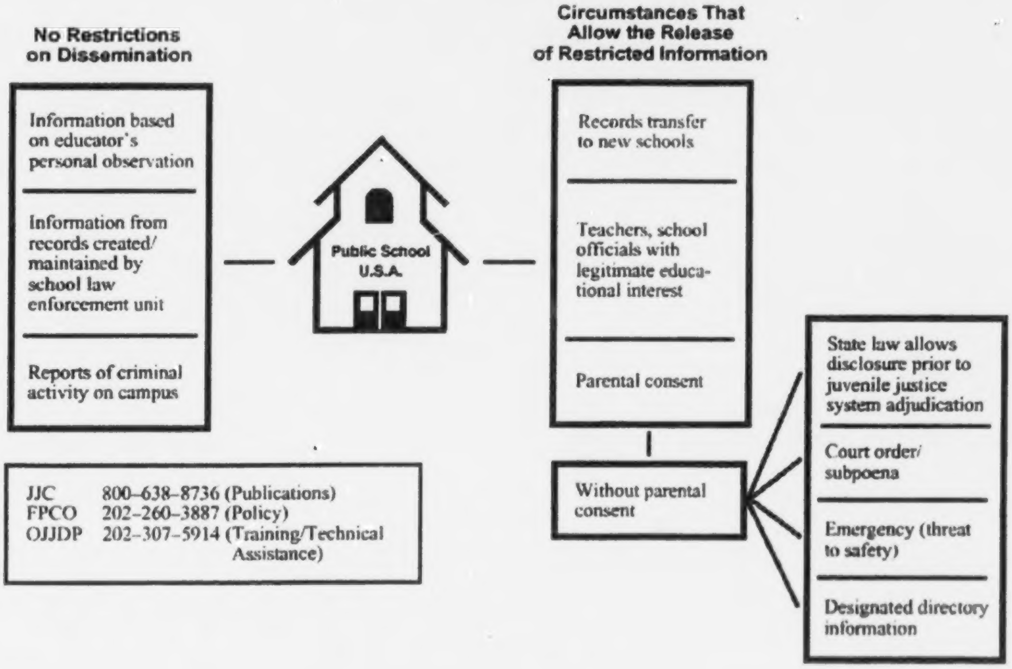
observations are not subject to the provisions of FERPA. Nonetheless, educators should take care not to circumvent the requirements of FERPA by making a referral that is predicated on knowledge obtained from the education record.

Statutory exceptions applicable to the prior consent requirement are set forth in detail under Title 34 of the Code of Federal Regulations, § 99.31. As a general rule, the law allows schools to disclose records without consent to the following parties: school employees who have a need to know; other schools to which a student is transferring; certain government officials in order to carry out lawful functions; appropriate parties in connection with financial aid to a student; organizations conducting certain studies for the school; accrediting organizations; individuals who have obtained court orders or subpoenas; persons who need to know in cases of health and safety emergencies; and State and local authorities, within a juvenile justice system, pursuant to specific State law.

FERPA at a Glance


No Restrictions on Dissemination
Information based on educator's personal observation
Information from records created/ maintained by school law enforcement unit
Reports of criminal activity on campus
Public School U.S.A.
Circumstances That Allow the Release of Restricted Information
Records transfer to new schools
Teachers, school officials with legitimate educational interest
Parental consent
Without parental consent
State law allows disclosure prior to juvenile justice system adjudication
Court order/ subpoena
Emergency (threat to safety)
Designated directory information
JJC 800-638-8736 (Publications)
FPCO 202-260-3887 (Policy)
OJJDP 202-307-5914 (Training/Technical Assistance)

Source: Office of Juvenile Justice and Delinquency Prevention Fact Sheet, May 1998 #78, by Michael Medaris.

The importance of sharing information with law enforcement was highlighted by a recent report issued by the Jefferson County, Colorado sheriff's office. The report was issued on the subject of the Columbine shootings and was issued in May 2000. The report emphasized the need for schools to share detailed information about their facilities with

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local police. Relatives of the victims stated their concerns about the lack of information that officers in Littleton had about the school building and whether that hampered their ability to save lives. In 1994, the Improving America's Schools Act established what is known as the State law juvenile justice system exception. With that legislation, Congress recognized that schools can have a crucial role in extended juvenile justice systems by authorizing states to enact legislation permitting disclosure of education records under certain circumstances. Under this exception, educators may disclose information from a student's record when all of the following conditions are met: (1) State law specifically authorizes the disclosure; (2) the disclosure is to a State or local juvenile justice system agency; (3) the disclosure relates to the juvenile justice system's ability to provide preadjudication services to the student; and (4) State or local officials certify in writing that the institution or individual receiving the information has agreed not to disclose it to a third party other than another juvenile justice system agency.

Under a new law in Michigan, police must notify schools when their students commit crimes outside of school, and students accused of in-school crime or violence must be reported to the police. Schools will have to report bomb threats, arson, sexual assault, drug use, and other incidents that could affect student safety. Governor John Engler signed 1999 PA 102 into law on July 6, 1999. The law calls for a coordinated approach to the sharing of school safety information regarding violent and potentially violent students and situations. Educators are worried about finding money to hire the school resource officers mandated in the law.

II. SCHOOL SEARCHES

The Fourth Amendment protects individual privacy in that it provides protection against unwarranted governmental intrusion. School officials may conduct a search of a student or a student's belongings if they have a reasonable suspicion that the student is violating the law or school rules. The search must be reasonable both at its inception and in its scope. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

Reasonableness of a search depends on the degree of certainty that a student has violated a school rule or the law and the extent to which the students' expectation of privacy will be infringed by the search. The lower the expectation of privacy, the less certainty required to make a search reasonable. Reasonableness also depends on the purpose of the search. Imminent danger may justify an intrusive search based only on reasonable suspicion.

Recent Cases:
In *D.B. v. State*, 728 N.E.2d 179 (Ind.App. 2000), the court held that a pat-down search by a school district police officer did not violate the student's Fourth Amendment rights. The high school student was found with another student in a bathroom stall, and the officer had smelled cigarette smoke. The search was justified at its inception, as the smell of smoke and the discovery of two students in the same stall was "suspicious." In addition, neither occupant of the stall responded to an initial inquiry by the officer.

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Furthermore, the pat-down search was reasonably related to its legitimate objectives, and was only minimally intrusive.

In another case decided under state law, *Com. v. Williams*, 749 A.2d 957 (Pa.Super. 2000), the court held that school police officers acted without authority when they searched student's vehicle. The officers opened a student's vehicle which was parked on a city street, off of school property, and searched its interior, seizing weapons and turning them over to the city police. The Pennsylvania Public School Code delineated the places at which the school police officers could act, and these were in school buildings, on school buses, and on school grounds. In this case, the school police officers were not in a school building, on a school bus, or on school grounds when they conducted the search and seizure.

School districts should implement policies that designate the lockers as school property and notify students that the school will conduct periodic searches for contraband. In addition, schools should distribute a policy that states student parking is a privilege, not a right, and require students to obtain a pass or permit. Both the policy and the permit should clarify that vehicles on school grounds are subject to searches and indicate student consent to such searches. If student cars are parked elsewhere, law enforcement officers should be called to conduct the search.

III. DRESS CODES AND SCHOOL UNIFORMS

A large number of districts have recently adopted policies about school uniforms. According to a recent survey conducted by the National Association of Elementary School Principals (NAESP and Lands' End, 1999) 11% of public schools are requiring school uniforms. This is a growing phenomenon, since the National Center for Education Statistics reported that in 1996 only 3% of public schools had school uniform policies. (Indicators of School Crime and Safety, p. 120 (1999)).

Advocates of school uniforms assert that the policies reduce school violence and improve school climate. Principals in schools with uniform policies reported strong benefits to student safety (75%) according to the NAESP Lands' End survey (1999). Before adopting a strict dress code or school uniform policy, schools should consider the following legal issues:

First Amendment – Freedom of Expression

Some circuits have indicated that dress is an expressive activity. *See e.g., Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972); *Breen v. Kahl*, 419 F. 2d 1034 (7th Cir. 1969); *Bishop v. Colair*, 450 F. 2d 1069 (8th Cir. 1971).

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If dress is protected speech, then attire and hair can only be restricted if it is: (1) materially and substantially disruptive; (2) pervasively vulgar; or (3) harmful to self or others. These standards have been used to uphold dress codes that prohibit attire that is immodest, disruptive, harmful, or unsanitary.

If dress is not expressive, it can be restricted for any legitimate reason. However, school officials should be cautious. Policies should be written to ensure they reasonably relate to their asserted purpose and are not vague. For example, one school district tried to justify its dress restriction policy based on its interest in reducing gang activity. However, the policy as written did not accurately describe the gang attire it sought to restrict.

First Amendment – Free Exercise of Religion

Some parents and children will have religious objections to uniforms. There are cases on religious objections. *E.g., Menora v. Illinois High School Association*, 683 F.2d 1031 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *Hicks v. Halifax County Board of Education*, 93 F.Supp.2d 649 (D. N.C. 1999); *Littlefield v. Forney Independent School District*, 108 F.Supp.2d 681 (N.D. Tex 2000). In *Hicks*, a great-grandmother brought action against the school board, asserting that adoption and implementation of a mandatory uniform policy violated her constitutional rights and those of her great-grandson. The court held that a genuine issue of material fact existed with respect to the burden imposed upon the plaintiff's religious beliefs by the school board's uniform policy, precluding summary judgment in favor of the school board. The court also held that suspension of the student on a long-term basis as he failed to comply with the mandatory uniform policy did not violate substantive due process and that school officials were entitled to qualified immunity from suit for damages in their individual capacities.

In *Littlefield*, students and their parents brought a § 1983 action against the school district, alleging that the mandatory school uniform policy violated their individual constitutional rights. The District Court held that the uniform policy and procedure permitting students to opt-out of the policy did not violate the establishment clause. In addition, the court held that the students' actions of wearing clothes of their choice was not expressive conduct protected by the free speech clause; that the uniform policy did not violate students' due process rights; and that the uniform policy did not inhibit parents' due process right to direct upbringing and education of their children.

State Right to an Education

The American Civil Liberties Union asserts that for a public school uniform policy to be legal, it has to have an opt-out provision. Because every child in this country has the right to a public school education, the organization emphasizes that the right cannot be conditioned upon compliance with a uniform policy. L. Siegel, *Point of View: School Uniforms* (ACLU, March 1, 1996), available at http://www.aclu.org/congress/uniform.html. Currently, there are no cases on this argument. Since the right to an education is dependent on the state constitution, these

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arguments would be state specific. To sidestep the legal issues involved, most districts have included opt-out provisions.

IV. DISCIPLINE AND DUE PROCESS

A. Procedural Due Process

School districts have the right to adopt reasonable rules and regulations to control student conduct, however the rights of school officials are not unlimited. Students enjoy certain constitutional, statutory and regulatory protections from arbitrary and unreasonable discipline. The U.S. Supreme Court has declared that children should not be forced to "shed their rights at the school house gate."[1] In public schools, students have the right to free exercise of religion,[2] freedom of expression,[3] freedom of association,[4] freedom against unreasonable search and seizure,[5] equal protection under the law,[6] and due process.[7] These individual liberties have long been determined to be rights of students in public educational establishments. Thus, these liberties are a guaranteed part of the public school experience.

Although education is not a federal constitutional right,[8] students have a property interest in education by virtue of state law.[9] In addition, some disciplinary sanctions may implicate a liberty interest. A school must show how its rules are reasonably related to maintaining safety and order in the school to protect students. According to the opinion of the United States Supreme Court in *Goss v. Lopez*, before taking away a student's liberty or property interest, a school must use fair procedures. For example, in order for a student to be suspended for 10 days or less, the student must be provided a fair and impartial hearing, informed of the charges and given the opportunity to respond. Expulsion procedures are state law dependent, but usually students may be represented by counsel and call witnesses. The school board makes evidentiary rulings.

Any code of conduct must provide for adequate procedural due process commensurate with the severity of the designated consequence. In other words, the extent of the procedures due depends on the nature of the interest being taken away. Moreover, the process must comply with state statutory requirements on student discipline. The process must also comply with federal and state authority regarding procedures required to discipline children with disabilities.

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[1] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
[2] *West Virginia v. Barnette*, 318 U.S. 624 (1943).
[3] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
[4] *Healy v. James*, 408 U.S. 169 (1972).
[5] *New Jersey v. T.L.O.*, 469 U.S. 325 (1984).
[6] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[7] *Goss v. Lopez*, 419 U.S. 565 (1975).
[8] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).
[9] *Goss v. Lopez*, 419 U.S. 565 (1975).

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B. Substantive Constitutional Issues

The cornerstone of due process is the prevention of arbitrary and abusive governmental power.[10] The state may not deny a person life, liberty or property unless it has fair or legitimate reasons. Due process may prevent state action regardless of the procedures that are made available. This aspect of due process is called substantive due process. Schools must be careful not to infringe upon the substantive constitutional rights of students. Vague and overly broad policies are more vulnerable to court challenge. In addition, schools must ensure that the punishment is not "shocking to the conscience."

Schools should ensure that the designated consequences are consistent with substantive due process considerations. Basically the rule and punishment must be reasonable. School districts should be certain that their policies are well drafted so that petty offenses are not subject to punishment. As such, districts must draft reasonable and sound policies. It is imperative that clear definitions be included to ensure notice of prohibited conduct. Policies should also not unintentionally include behavior that the school district does not wish to cover.

Usually, the state's interest in disciplinary situations is to maintain order in the school or to protect students. A school district must show that its rules are reasonably related to these purposes in order to pass the substantive due process test. It is important to note that codes of conduct regulating off-campus student behavior have been recognized as being reasonably related to this interest, as long as the behavior has an impact on the school.

In particular, schools must be especially careful where the misconduct involves some form of speech. When speech is potentially involved, the policy should define the offense to exclude expression protected by the First Amendment. Nonetheless, protection under the First Amendment is not absolute. Schools may restrict speech that is protected by the First Amendment when it could lead to a "material and substantial interference" with the operation of the school or infringe upon the rights of others.[11] In addition, schools are allowed to prohibit vulgar or offensive speech regardless of whether the speech causes a substantial disruption.[12]

C. Fair and Consistent Enforcement

The Fourteenth Amendment to the U.S. Constitution states, in part, that no state shall ". . . deny to any person within its jurisdiction the equal protection of the laws." Equal protection under the Fourteenth Amendment requires that all persons similarly situated should be treated alike.

As with any disciplinary policy, fair and consistent enforcement of policies is essential if they are to be respected by students and the community at large. The purpose of a code

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[10] *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

[11] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

[12] See *Pyle v. South Hadley School Committee*, 861 F. Supp. 157 (D. Mass. 1994).

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of conduct is to define proscribed behavior and disciplinary procedures for circumscribed offenses; thus there is no room for inconsistent administration of punishments. However, the possibility of inconsistent enforcement still exists in the area of disciplinary violations. If discrepancies in enforcement become apparent, the policy becomes ineffective and the district is open to charges of discriminatory application.

TYPES OF DISCIPLINE

The particular type of discipline imposed will vary from school district to school district and depend upon the nature of the infraction, the disciplinary record of the student, and other circumstances. Potential disciplinary measures span the continuum from a simple verbal reprimand to permanent expulsion from the district. This section will outline the different types of disciplinary measures and the general legal rules and standards that apply.

A. Grade Reduction and Academic Sanctions

Academic decisions are typically considered to be matters concerning educational policy. Courts generally defer to schools on matter of educational policy, unless the policy is arbitrary, capricious, or malicious. Often times, students and parents will contend that a grade was given unfairly, or that the student deserved a better grade. Students and parents have filed lawsuits seeking re-examination of a grade. Courts have routinely denied these requests. To have a grade changed, it must be shown that the teacher acted in a manner deemed arbitrary, capricious, or malicious.

Schools should not reduce grades or other academic performance indicators because students engage in prohibited behaviors (e.g. smoking). Grades should represent classroom performance. One high school decided to impose a rule that stated grades would be reduced 4% for each day of suspension for alcohol-related misconduct. A federal court held that the rule violated substantive due process.[13] The court did not believe that the school district could articulate a reasonable relationship between the use of alcohol and a reduction of grades. To the contrary, courts have upheld grade reductions imposed for absenteeism or truancy on the theory that grades should reflect effort, including class attendance and performance.[14]

B. Withholding Diplomas

The rule pertaining to withholding diplomas is similar to the rules above. Generally, academic rules should reflect academic accomplishment. If a student has earned a diploma, the diploma may not be withheld, even if the student has engaged in misconduct that would justify discipline. Conversely, where a student has not fulfilled all the requirements for a diploma, the district is under no obligation to issue one.[15]

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[13] *Smith v. School District of Hobart*, 811 F. Supp. 391 (N.D. Ind. 1993).

[14] See *Williams v. Board of Education of Marranna School District*, 626 S.W. 2d 361 (Ark. 1982); *Campbell v. Board of Education of New Milford*, 475 A.2d 289 (Conn. 1984).

[15] See *Shuman v. Cumberland Valley School District*, 536 A.2d 490 (Pa. Commw. Ct. 1988).

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C. Exclusion from Extracurricular Activities

Suspension or expulsion from extracurricular activities is another common student disciplinary sanction. The courts have found that due process protections do not apply since property and liberty interests are not implicated in such situations.[16] In numerous cases, students have challenged their removal from extracurricular activities either for failure to meet eligibility requirements or as a penalty for inappropriate behavior.[17] However, the courts have been very consistent in holding that a student does not have a property interest in participating in extracurricular activities, either athletic or non-athletic.

Courts have also been consistent in finding that exclusion from extracurricular activities does not result in a violation of a liberty interest. Although the penalty may result in a stigma, it does not produce a concomitant loss of a property interest.

D. Athletic Suspensions

State rules or state athletic association rules may dictate the procedures that a school must follow before imposing an athletic suspension. This is not mandated by the U.S. Constitution.

E. Corporal Punishment

Corporal punishment is the use of any physical means as a form of discipline. Twenty-seven states have banned corporal punishment.[18] The remainder of the states operates under the common law notion that reasonable corporal punishment in schools is permissible.[19] However, even where corporal punishment is permitted as a matter of state law, school districts frequently prohibit the practice as a matter of school board policy. Interestingly, the U.S. Supreme court found that reasonable corporal punishment was not unconstitutional as "cruel and unusual punishment" under the Eighth Amendment.[20]

Generally, to be valid corporal punishment must be allowed by state law, permitted- or not prohibited- by district policy, implemented in a manner consistent with state and district requirements, and used as a method of correction. In addition, corporal punishment must not be cruel or excessive and not be motivated by anger or malice. Finally, such punishment should be suitable for the age, sex and physical condition of the child and appropriate for the offense.

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[16] See *McFarlin v. Newport Special School District*, 784 F. Supp. 589 (E.D. Ark. 1992).

[17] See *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989); *Heimberger v. School District of City of Saginaw*, 881 F.2d 242 (6th Cir. 1989).

[18] Alaska, Hawaii, Washington, Oregon, California, Nevada, Utah, Montana, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Illinois, Wisconsin, Michigan, New York, Vermont, New Hampshire, Maine, Massachusetts, Connecticut, Rhode Island, New Jersey, West Virginia, Maryland, Virginia.

[19] Idaho, Wyoming, Delaware, Colorado, New Mexico, Arizona, Texas, Oklahoma, Kansas, Missouri, Arkansas, Louisiana, Indiana, Ohio, Pennsylvania, Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Florida.

[20] *Ingraham v. Wright*, 430 U.S. 651 (1977).

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If school officials engage in unreasonable corporal punishment, the individual or the district, or both, may be subject to a civil rights suit, a civil suit for battery, or a criminal action for battery. The individual employee administering the corporal punishment may be subject to school disciplinary measures.[21] In a growing number of jurisdictions, courts are finding that corporal punishment, when unreasonable and severe, violates a student's substantive due process rights.[22] The standard that must be met before corporal punishment is found to be unreasonable is quite high.

The substantive due process inquiry in school corporal punishment cases is the same inquiry employed in police brutality cases. The inquiry is whether the force applied caused injuries so severe, so disproportionate to the need presented, and was inspired by malice or sadism rather than merely a careless or unwise excess of zeal, that it amounted to a brutal and inhuman abuse of official power that was literally "shocking to the conscience."[23] Other courts have found a violation of substantive due process when the punishment was "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."[24]

F. Suspension

Suspension, whether in school or out-of-school, is a common form of school discipline. The U.S. Supreme Court has made it clear that exclusion from educational services requires some form of due process. The precise parameters, or what process is due, depend upon the length and nature of the suspension. In *Goss v. Lopez*,[25] the Supreme Court decided that for an out-of-school suspension of less than ten days, sufficient due process is afforded if the hearing is conducted spontaneously and informally. The Court's decision in *Goss* outlined the following minimal requirements: oral or written notice of the charges; an opportunity to explain, deny or admit the charges or evidence; and a decision based on the evidence heard.

Students who pose a danger may be removed immediately. Notice and a hearing should be conducted as soon as possible thereafter. In addition to the federal constitutional standard required by the *Goss* decision, most states have statutes that address suspension from school.

Recognizing that removing students entirely from the school environment may provide them with reinforcement rather than negative consequences for inappropriate behavior, many schools have turned to the practice of in-school suspensions. Early in our history, in-school suspensions were found not to constitute false imprisonment.[26] The question then becomes whether due process guarantees attach to this disciplinary sanction. If due

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[21] See *Rush v. Board of Education of Crete-Monee Community Unit School District No. 201-U*, 727 N.E.2d 649 (Ill. App. 3 Dist. 2000)(tenured shop teacher terminated for administering electric shocks in lieu of detention).

[22] See *Rubek v. Barnhart*, 814 F.2d 1283 (8th Cir. 1987); *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); *Metzger v. Osbeck*, 841 F.2d 518 (3rd Cir. 1988).

[23] *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

[24] *Jefferson v. Ysleta Independent School District*, 817 F.2d 303 (5th Cir. 1987).

[25] 419 U.S. 565 (1975).

[26] See *Fertich v. Micherer*, 11 N.E. 605 (Ind. 1887).

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process guarantees do attach, the next question is what process is due before an in-school suspension can be implemented. The amount of due process required depends on how long the suspension will last and whether the student will be deprived of an education during the suspension. Courts disagree on whether deprivation of an education means being deprived of classroom instruction or being deprived of the opportunity to engage in educational activities during school time.

Some courts have found that the use of an in-school suspension implicates the student's property and liberty interests, but is *de minimis*. In other words, it is not a significant intrusion. As such, no due process steps are necessary.[27]

G. Alternative Educational Assignments or Disciplinary Transfers

Many school districts also use disciplinary transfers. However, some schools are developing alternative educational programs to deal with students who are disruptive in the regular school setting, but have the capacity and need to succeed. Most schools that have difficulty setting up alternative educational programs lack the facility and/or funds to do so. It remains an open question as to what degree of due process is required to sustain a disciplinary transfer. In one case, the court upheld a student's transfer that was made without the provision of due process.[28] The court found that the student lacked federal standing because his transfer, which was under a state statute permitting such action by the school district, did not deprive him of a liberty or property interest. Most districts do provide a conference with parents and students as a precursor to reassignment.

H. Expulsions

Expulsion requires that school personnel provide greater procedural due process since the property interest being jeopardized is greater. The procedures are, therefore, more complex. Students continue to be subject to compulsory school attendance laws, thus, parents will generally be required to enroll their children in private school or otherwise meet the requirements of the compulsory attendance mandates of the state.

For children in the regular education program (as opposed to the special education program), the district generally does not have a continuing requirement to serve once the child is expelled. These students can be barred from educational and extracurricular activities. However, some districts, believing that the need for children to be educated is paramount, provide educational services to children in some manner during periods of expulsion. State law may control such continuing education requirements.

Expulsion procedures are commonly specified in state statutes. In many states, students are entitled to full hearings before the school board with representation, presentation of witnesses and subpoena power. At a minimum, the following must be afforded:

1. written notice of the charges, with sufficient specificity so the student can mount a defense;

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[27] See *Wise v. Pea Ridge School District*, 855 F.2d 560 (8th Cir. 1988); *Hayes v. Unified School District*, 669 F. Supp. 1519 (D. Kan. 1987).

[28] *Nevares v. San Marcos Consolidated Independent School District*, 111 F.3d 25 (5th Cir. 1997).

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2. sufficient time between the notice and the hearing to allow the student to prepare a defense;
3. at the hearing: the right to present evidence, cross-examine witnesses, and the right to use counsel to the same extent the school does;
4. a decision made on the merits by an impartial party or panel.

In regards to the last procedural requirement, a court held that a school attorney involved in prosecuting a disciplinary case may not participate in board deliberations.[29]

The Gun Free Schools Act, 20 U.S.C. § 8921, requires that public schools pass a policy mandating a one-year expulsion for students who bring firearms to school. Without such a policy, the district will not qualify for certain federal funds. Most state legislatures expanded the types of offenses and disciplinary infractions that would lead to expulsion, beyond possession of a firearm. For example, in 1996, the Illinois legislature adopted 105 ILCS 5/10-22.6(d), which requires school boards to expel students for not less than one year for bringing a weapon to school or any school-sponsored activity or event, or any activity or event which bears a reasonable relationship to school. The term "weapon" has a broader definition than does the term "firearm."

HEARING PROCEDURES

Although expulsion procedures are frequently set forth in state statutes, the courts have provided some useful guidance on procedural issues. In *Bethel School District No. 403 v. Fraser*, the U.S. Supreme Court determined that school disciplinary rules must provide students with adequate warning of prohibited conduct, but need not be as detailed as a criminal code.[30] As such, it is important for school districts to be clear as to which punishments attach to which crimes.

In the absence of state or school district standards to the contrary, whether a student has a right to cross-examine witnesses depends on several factors, *e.g.*, the existence of an essential disputed fact, the identity of the witness, the burden to the process and the burden to the witness. In some situations, student witnesses can even remain anonymous to the student charged if there is a substantial likelihood of reprisal or harm to the student witnesses.[31]

Since an expulsion hearing is an administrative proceeding, formal rules of evidence do not apply. Generally, any probative evidence can be admitted. However, hearsay evidence may have to be corroborated. Typically, hearsay evidence, by itself, is legally insufficient to support a finding that an element of the *prima facie* case is present. In addition, the student who is the subject of the hearing has the right to testify. Because the Fifth Amendment right against self-incrimination applies only to criminal proceedings, students may be required to testify.

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[29] *Gonzalez v. McKuen*, 435 F. Supp. 460 (C.D. Cal 1977).

[30] 478 U.S. 675 (1986).

[31] See *Newsome v. Batavia Local School District*, 842 F.2d 920 (6th Cir. 1988); *Johnson v. Humble Independent School District*, 799 F. Supp. 43 (S.D. Tex. 1992).

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Students must have notice of the specific charges against them. However, evidence of prior misconduct may be admitted to a hearing for the purpose of determining an appropriate penalty. In regards to Miranda Warnings, courts have generally rejected the argument that students must be given the warning before questioning by school officials.

In the absence of a state law on the issue of right to counsel, courts have generally held that students have the right to use counsel to the same extent that the school district uses counsel during the proceeding. This is based on fundamental fairness principles. In regards to a right to review the decision, constitutional notions of due process do not require an internal appeal. In expulsion situations, most states provide a right of appeal to the state department of education, an intermediate level educational agency such as the county board, and/or the courts.

EXAMPLES:

1. *In the Interest of Douglas D.*, 608 N.W.2d 438 (Wis.App. 1999). The Wisconsin Court of Appeals upheld a finding of delinquency in the case of an Oconto, Wis., student who wrote an essay about an upset student who beheads his teacher with a machete. The student was suspended for a year and a state trial court found him delinquent. The student appealed, and the state appeals court held that the essay fell within the category of speech known as true threats, which are not protected by the First Amendment.

2. In April 2000, Charles Carithers, a junior at Boston Latin Academy, wrote a story called "Making the Grade" about a student athlete who takes a chainsaw to an English teacher. He did so after he was assigned to write a horror story with a suspenseful ending for English class. Instead of getting a grade, he got a three-day suspension. The ACLU asked Boston School Superintendent Thomas W. Payzant to annul the suspension, but Payzant said that he will allow the appeals process to go forward.

3. In April of 2000, the Rutherford Institute volunteered to represent four kindergarten students suspended for playing cops and robbers on a school playground in Middlesex County borough in N.J. The students were suspended for three days for pretending that their fingers were guns and saying they wanted to shoot each other, frightening other children. William Bauer, superintendent of Sayreville schools, said that the district does not have a formal zero-tolerance policy in regards to violence, but is willing to review its policies after complaints about the suspensions. The incident will not be noted in the students' permanent records.

4. *Turner v. South-Western City School Dist.*, 82 F.Supp.2d 757 (S.D.Ohio 2000). A high school student, expelled for bringing a look-alike gun to school, would not be granted a preliminary injunction reinstating him in time to graduate. The student could not make the necessary injunction showing that he was likely to succeed on the merits of his claim. The handbook provision he violated was not overbroad or vague. All of the procedural due process required for suspension and expulsion were complied with. Also, the student could not show irreparable injury, as he was offered

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a combination of alternative school and eventual reinstatement that would have resulted in timely graduation.

V. ZERO TOLERANCE

A zero tolerance policy is generally defined as a school or district policy that mandates pre-determined consequences or punishment for specific offenses, regardless of the circumstances or past disciplinary history of the student involved.

As reported in NCES Indicators of School Crime and Safety (1999):

> Most public schools reported having zero tolerance policies that apply to serious student offenses. Nine out of 10 schools reported zero tolerance policies for firearms (94%) and weapons other than firearms (91%). Eighty-seven percent of schools had policies of zero tolerance for alcohol and 88% had zero tolerance policies for drugs (controlled substances). Most schools also had zero tolerance policies for violence (79%) and tobacco possession violations (79%).

The Gun Free Schools Act, 20 U.S.C. § 8921 (1995 Supp.) requires schools to have a zero tolerance policy for guns as a condition to receiving ESEA funds. Schools must pass a policy mandating a one-year expulsion for students who bring firearms to school. Exceptions are allowed on a case by case basis.

Schools may wish to consider zero tolerance policies for students who make threats of violence or bring weapons to school. Such a policy might include expulsion or suspension of students who threaten to kill or who seriously assault others and, when appropriate, quickly provide for psychological evaluation or intervention for these students. A clear and consistent message that threats of violence will not be tolerated may help to reduce the actual occurrence of violence. Before adopting zero tolerance policies, schools should consider at least the following issues:

1. Adequate Due Process Is Provided--Any zero tolerance policy must provide for adequate procedural due process in accordance with the severity of the designated consequence or discipline for the particular offense.

See *James v. Unified Sch. Dist. No. 512*, 899 F.Supp. 530 (D. Kan. 1995).
Student who was expelled for possession of firearm on school property sought temporary restraining order requiring school to permit him to take his final exams, or in the alternative, to be awarded grades earned through date of expulsion and to be allowed to attend school during the next school year. The court held that school's expulsion process comported with requirements of procedural due process.

The process, obviously, must also comply with state statutory requirements on student discipline. See *D.B. v. Clarke County Bd. of Educ.*, 469 S.E.2d 438 (Ga. Ct. App. 1996). Student appealed school board's decision to permanently expel her from school, and the Board of Education affirmed. The Court of Appeals held that: (1) permanent expulsion of

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student for disciplinary reasons did not conflict with or violate student's constitutional right to free public education or a compulsory school attendance statute, and (2) student's permanent expulsion for stabbing another student with knife did not violate local board policy or student's due process rights.

Further, the process must comply with federal and state authority regarding procedures required to discipline children with disabilities. See *Miller v. Board of Educ.*, 690 A.2d 557 (Md. Ct. App. 1997). Parents sought review of state board of education decision affirming students' expulsion for possession and use of controlled, dangerous substance on school grounds. The Court of Appeals held that: (1) student was not entitled to special statutory procedures for students with disabilities absent previous finding that student was disabled; (2) statute prohibiting use of statements made by student seeking drug counseling was inapplicable; (3) expulsion was supported by substantial evidence; and (4) student's due process rights were not violated.

2. No Infringement of Constitutional Rights--Especially where the misconduct involves some form of speech, the policy should define the offense to exclude expression protected by the First Amendment. Vague and overly broad policies are more vulnerable to court challenge. Schools should also ensure that the designated consequences are consistent with substantive due process considerations. Basically the rule and punishment must be reasonable. Finally, schools must ensure that the punishment is not "shocking to the conscience."

See *London v. Dewitt Public Schools*, 194 F.3d 873 (8th Cir. 1999). Middle school student and his mother sued school superintendent, teacher, and other school officials, alleging substantive and procedural due process violations in connection with student's suspension and expulsion following altercation with teacher. The Court of Appeals held that: (1) there was no substantive due process violation in connection with student's altercation with teacher; (2) student failed to establish procedural due process violations in connection with his suspension and expulsion; and (3) plaintiffs failed to support claim that school district discriminated with respect to staffing in its schools.

3. Loss of Discretion--Before adopting zero tolerance policies, school districts should be certain that they are willing to deliver the same punishment for "minor infractions" of the policy, foregoing any consideration of external circumstances or mitigating factors. Zero tolerance policies relinquish the authority of boards and administrators to exercise sound discretion and judgment and so should be reserved for offenses where such an approach is absolutely critical to promoting student health and safety. School districts should be certain that their policies are drafted well enough so that petty offenses are not subject to punishment. As such districts are completely reliant on the reasonable and sound drafting of the policy.

See *Kolesnick v. Omaha Pub. Sch. Dist.*, 558 N.W.2d 807 (Neb. 1997).
Student sought judicial review of his expulsion. The trial court reduced student's expulsion from two semesters to one semester. School district appealed. The Nebraska Supreme Court held that: (1) expulsion of student for knowing possession of knife on

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school property was rationally related to school district's interest in protecting other students and staff from violence; (3) no shocking disparity existed between student's sentence and his offense; (5) district's adoption of code of student conduct was neither arbitrary nor capricious; (6) district's expulsion of student from school for two semesters was neither arbitrary nor capricious.

4. **Clear Definitions**--Because punishments are "automatic" under zero tolerance policies, it is imperative that clear definitions be included to ensure notice of prohibited conduct and that policies do not unintentionally sweep in behavior that the school board does not wish covered.

See *Giles v. Brookville Area Sch. Dist.*, 669 A.2d 1079 (Pa. Commw. Ct. 1995). Student appealed school board's expulsion of student for violating school district's drug policy. The court held that: (1) school board's determination that its policy prohibiting sale of drugs on school property also proscribed agreement on school property for sale of marijuana, with actual exchange of money for drugs off school property, was not abuse of discretion, and (2) one year expulsion of student was proper sanction for selling marijuana.

5. **Consistent Enforcement—**The purpose of zero tolerance policies is to provide a uniform punishment for specified disciplinary actions. From this perspective, zero tolerance policies are consistent by definition. However, as with any rule there is the possibility of inconsistent enforcement. If discrepancies in enforcement become apparent, the "get tough" message is nullified and may lead to charges of discrimination.

See *Dornes v. Lindsey,* 18 F.Supp.2d 1086 (C.D.Cal. 1998). Middle school student sued school principal, alleging civil rights, due process and equal protection violations under federal and state law arising out of procedures followed in connection with her expulsion from school. On principal's motion for summary judgment, the court held that: (1) unsupported statement that student was only African-American student in her school was insufficient to support claim of equal protection violation; (2) student received all process she was due in disciplinary proceedings; (3) principal acted within scope of her statutory authority in investigating charges and recommending student's expulsion.

See also *Smith v. Severn*, 129 F.3d 419 (7th Cir. 1997). Parent brought state court action on behalf of high school student against school district and principal, alleging that student's three-day suspension from school violated student's rights to due process and equal protection. The student was suspended for violating rules regarding the Homecoming lip sync contest, disorderly conduct, bringing a chainsaw to school, insubordination, and gang activity. The Court of Appeals held that: (1) suspension did not violate due process, and (2) suspension did not violate equal protection.

Are Zero Tolerance Policies Effective?
In Baltimore, Maryland, an aggressive zero-tolerance law adopted last spring by the school board is credited with producing a 67% decline in arrests and a 31% decline in school crime in September and October 1999, compared with the same time a year earlier

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(See "Decatur Furor Sparks Wider Policy Debate," Education Week, November 24, 1999, by Robert C. Johnson).

In Texas, a survey found that from 1993 to 1998, the percentage of teachers who viewed assaults on students as a "significant problem" dropped from 53 to 31 (See "The Fight's Not Over," The New Republic, December 6, 1999). It is during this time that Texas mandated expulsion of students for drugs and weapons on school grounds and at school events.

Recommendations

A zero-tolerance policy must be integrated into a comprehensive school safety plan that focuses on a positive school climate and is balanced with prevention, intervention and enforcement strategies. Discipline policies, in general, are an opportunity to teach students about their rights and responsibilities to themselves and others. It is important that all school rules are reasonable and are a part of the learning process.

Reasonable zero-tolerance policies specify what types of conduct will result in the automatic penalty of suspension or expulsion. For lesser violations, outlined aggravating and mitigating circumstances should be taken into consideration. Finally, all due process procedures must be followed, and statutory and constitutional rights protected.

Schools should establish reasonable zero-tolerance policies for students who present a danger to others. Students who pose a threat must be dealt with under school policies and this information should be communicated to local law enforcement to assist in preventing violence in the community. It is also important to establish an assistance program to teach students how to handle substance abuse, violence, anger management and bullying. Schools should work with their community to create partnerships with social service organizations and other service-oriented groups that can provide resources to troubled students.

Such a policy might include expulsion or suspension of students who threaten others and, when appropriate, quickly provide psychological evaluation or intervention for these students. We, as members of the school community, must recognize and convey to students, that threats are a crime. They must be dealt with accordingly. When adults take threats seriously, students will realize that threatening others is not acceptable behavior.

School policies should be developed with and distributed to school personnel, students, parents and community members. Inviting input from the community and parents regarding acceptable behavior and punishment reduces resistance to such policies. If the community has ownership in the policy, it is more likely to support the policy during difficult times.

Schools should not tolerate behavior that would be punished as illegal off campus. Schools should not be a haven for misbehavior. Schools should be a place where students learn civic responsibility and where appropriate behavior is expected. It is important to keep schools the safest place for children in America (*Violence and*

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Discipline Problems in U.S. Public Schools: 1996-1997, National Center for Education Statistics, 1998).

VI. DISCRIMINATION

School districts must establish measures to assure that threat assessment does not degenerate into racial/gender/class stereotyping and that suggested referrals/interventions are not discriminatory. Discrimination suits will proliferate as schools implement safety measures to deal with violence in our nation's schools.

For example, in *Fuller v. Decatur Public School Board of Education*, 78 F.Supp.2d 812 (C.D.Ill. 2000), high school students expelled for fighting in the stands during a football game joined their adult representatives in suing the school board and individual members, seeking an order reinstating the students. The students argued that they were expelled because of a zero tolerance policy that punished them as a group, denied their constitutional rights and was racially motivated. The court held that the expulsion of the students satisfied procedural due process requirements, and that the equal protection rights of the students were not violated. The court further held that the school board had not relied upon a zero tolerance to violence position in reaching their expulsion decision. Finally, the court found that the students' memberships in recognized gangs precluded their challenge to a disciplinary rule prohibiting gang activity on the grounds that the definition of "gangs" was unconstitutionally vague.

VII. SCHOOL RESOURCE/SECURITY OFFICERS

One recurrent theme of prevention is the use of local law enforcement personnel, in uniform, as full time School Resource Officers. This presence will not guarantee safety, but resource officers can help to prevent tragedy and to react immediately if a crisis occurs. However, the visible presence of law enforcement on a school's campus enhances the proactive nature of the school's violence prevention efforts and can positively impact its security and safety on several levels. (See *Starting a School Outreach Program in Your Community: An Effective Practices Outline for the School Resource Officer Approach*, by the Center for the Prevention of School Violence, 1999.) This gives students an opportunity to develop trust and to talk to law enforcement in a neutral, non-threatening atmosphere. In addition, the school resource officer can serve as a conduit between the school and the community. In many of the shootings that took place around the country, the students were talking about the pending violence not only in their schools, but also in the community. Hence, the need for a strong law enforcement/school relationship is paramount. Selection of the right officer is crucial to the success of the program. Proper training of the school resource officer is equally important. Employment and liability issues may determine whether a school district hires its own security personnel or uses a sworn officer from the local law enforcement agency.

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While school districts may wish to secure the services of either school resource officers or police officers in an attempt to secure greater levels of school safety, districts are advised to consult with their school attorneys prior to doing so. The U.S. Supreme Court has previously ruled that school districts have greater flexibility in conducting searches and seizures upon students then law enforcement officials enjoy. Specifically, school officials are required to demonstrate that they have "reasonable suspicion" to conduct a search. This standard affords greater deference to school officials than the probable cause standard upon which law enforcement officials are required to justify their searches. To the extent a search is conducted upon a student by a police officer or school security officer, a student may be able to successfully claim that the search was not justified at its inception and be able to preclude the district from proceeding against the student in either a disciplinary action or in a criminal context or indeed, utilizing any "illegally" seized contraband against the student in such proceedings. Therefore, prior to employing security officers or working with the police, districts would be wise to have full knowledge of the impact such decisions will have upon their ability to justify their searches.

For example, in April 2000 a ruling in New Hampshire by Rockingham County Superior Court Judge Patricia Coffey affected the role and usefulness regarding a school resource officer. Coffey granted a motion to suppress evidence in a drug possession case. Coffey ruled that the assistant principal was acting as an agent of the police and failed to follow state procedure when he searched a student. An assistant principal searched a student based on information he gained from the school's resource officer, who said he did not have legal cause to conduct the search. The search turned up LSD and the officer arrested the student. The student was not read his Miranda rights when searched, and Coffey said that was reason to suppress the evidence. County Attorney Jim Reams said his office will appeal.

To the contrary, a court in New Mexico ruled that a police officer's search of a student at a school official's request was subject to the reasonableness analysis. In the case, *In re Josue T.*, 989 P.2d 431 (N.M.App. 1999), the New Mexico Court of Appeals held that a reasonableness standard, rather than the more stringent Fourth Amendment standard of warrant and probable cause, applied to a school resource officer's search of a student at the request of a school official. The resource officer, a commissioned police officer assigned full-time to the school, merely assisted a school official, during the school day, at the school official's request, in furtherance of the school's objective to maintain a safe and proper educational environment. Further, the court held that the challenged search had been justified at its inception by a reasonable suspicion that law or a school policy was being violated. The school official had reason to believe before speaking with the student that marijuana had been smoked in the vehicle in which student had come to school, and knew that marijuana had not been found on the driver or in the vehicle. After asking the student to come to the official's office, the officer and the official observed the student acting unusually, refusing to empty one of his pockets on request and refusing to remove his hand from that pocket, and saw the student's pocket bulging with an obviously heavy object.

VIII. SECURITY MEASURES

Schools around the country are assessing and implementing different security measures depending upon the particular problems and needs of their schools. As school officials consider different measures, they should take into account any federal and/or state laws that may preclude them from implementing certain measures. At times, school districts that carefully select methods to protect their students and staff will still have to face lawsuits. School districts should consider meeting with parents and members of the community in selecting school safety plans. For example, in the Comal School District in Texas, at least 300 parents, teachers and students gathered for the Safe Schools meeting at the Guadeloupe Valley Telephone Cooperative Headquarters to discuss appropriate solutions to address the nine bomb threats since Jan. 13, 2000, which have forced evacuations at several schools. Four arrests have been made in three of the nine bomb threats. Three students have been charged with state jail felonies. A fourth student was charged with a misdemeanor. They also face up to a one-year expulsion from the Comal School District. A popular suggestion by parents was to install metal detectors in schools to prevent unnecessary evacuations. Superintendent Jerry Major said, "We've received some criticism for evacuating, but it's what most moms and dads expect us to do. We're going to put the health and safety of the kids first every time." In response to the threats, school officials have heightened security, conducted visual checks of students' belongings, and are monitoring students going in and out of restrooms. Backpacks are prohibited. The evacuations have caused more than a day's worth of classroom instruction to be lost. Students will have to make up classes Feb. 17, a student holiday.

Even though some schools are under tremendous pressure to do more-- or to do less and to quit "overreacting"-- results from a CNN/USA TODAY/Gallup Poll released in April 2000 show that many parents feel that schools have acted prudently in preventing violence. The poll, which questioned adults with school-age children, showed that a majority of parents remain deeply concerned about their children's safety but are generally satisfied with measures their schools have taken to prevent violence. Some additional findings: 68% believe schools have taken "the right amount" of action to prevent violence; 4% say schools have gone too far; 28% say schools have not done enough. Nonetheless, 49% believe school shootings could happen regardless of any actions taken by government and society. About the same number, 48%, say government and society can be effective in stemming school violence. The poll surveyed 291 parents April 7-9 and has a margin of error of +/- 6 percentage points.

Other districts have turned to threat assessment programs to identify potentially dangerous students. The Placentia-Yorba Linda Unified School District in California is testing the Mosaic 2000 computer system that was designed to help schools deal with potentially violent students. Mosaic 2000 is a checklist of questions school administrators can ask to help determine how serious a threat is and how best to address it. Los Angeles County District Attorney Gil Garcetti, security expert Gavin de Becker and a state attorney from Illinois designed Mosaic 2000. Liz Schroeder of the ACLU feels that "this is a very disturbing program because it's designed to classify students as potentially dangerous. It may have the unintended consequence of sending troubled kids

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underground." Defenders of the program say that no information will be retained in a database, so there can be no profiling.

Many schools are now requiring students to wear ID badges as part of added security measures. However, even this simple measure has been met with threats of litigation. In Ruston, Louisiana, two students are circulating a petition to have the cards changed or removed. Jonathan Washington and Rachel Winchel, both 16, assert that the barcode encryption is not sufficient in masking their social security numbers on the badges. Jonathan, whose concern is a philosophical one, can read any barcode in about 15 seconds. Rachel, whose concern is also based on her religious and moral convictions, feels that students should not be branded and labeled as livestock. Jonathan's parents are seeking legal counsel and expect to take the school to court for civil damages if the change is not made. While the Ruston High School Student Handbook details the rules regarding the cards and spells out the possible penalties for infractions, including expulsion, neither Jonathan nor Rachel has been disciplined yet.

Schools around the country have also installed metal detectors to promote safety. However, this safety measure has been challenged as well. In *Thompson v. Carthage School District*, 87 F.3d 979 (8th Cir. 1996), a high school student brought a § 1983 wrongful expulsion action against the school superintendent, principal and board of education members. The student was expelled from high school after school officials found crack cocaine in his coat pocket while looking for guns and knives reported to be on school grounds. Although the district court awarded $10,000 in damages for "wrongful expulsion" because the search violated the student's Fourth Amendment rights, the Circuit Court had a different opinion. The Circuit Judge held that the principal's decision to undertake a generalized search in which all male students from grades six to 12 were searched for dangerous weapons by emptying their pockets and being patted down if the metal detector sounded did not violate the student's Fourth Amendment rights.

The presence of metal detectors calls into question whether schools conducting such a mass "search" have individualized reasonable suspicion to do so. However, courts have permitted non-individualized searches by metal detectors. In *People v. Dukes*, 580 N.Y.S.2d 850 (NY Crim. Ct. 1992), a student charged with criminal possess of a weapon as a result of the discovery of a switchblade knife in her bag moved to suppress the knife on the grounds that her Fourth Amendment rights were violated. The Board of Education had established detailed guidelines regarding periodic scanning of schools by Special Police Officers from the Central Task Force for School Safety. The officers used hand-held scanning devices, and the students at the schools selected for periodic scanning were told that searches would take place, but were not given any specific dates in advance. Signs announcing a search for weapons were posted outside the building on the day Tawana Dukes was searched and the switchblade was found. The court held that the intrusion involved was not greater than necessary to satisfy the governmental interest underlying the need for the search, and thus, the administrative search was reasonable under the Fourth Amendment. Under the "administrative search" doctrine, such searches are reasonable as part of a regulatory scheme in furtherance of an administrative purpose.

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Finally, several school districts have installed surveillance cameras in their schools. The state of Texas has a statute that allows videotaping in common areas without parental consent. However, the statute carefully explains that the videotape must only be used for "purposes of safety, including the maintenance of order and discipline in common areas of the school or on school buses; a purpose related to a co-curricular or extracurricular activity; or a purpose related to regular classroom instruction." For states that do not have a specific statute, the board should adopt and implement a policy that carefully explains the reason for the policy. If used for purposes of maintaining safety and order, the video surveillance should pass constitutional muster. The policy should be included in the student handbook, so as to put students on notice that they will be videotaped. In addition, the policy must be adhered to, i.e., the video should only be used for the stated purpose.

SAMPLE VIDEO SURVEILLANCE POLICY

The Board authorizes the use of video cameras on district property to ensure the health, welfare and safety of all staff, students and visitors to district property, and to safeguard district facilities and equipment. Video cameras may be used in locations as deemed appropriate by the superintendent.

The district shall notify staff and students through student/parent and staff handbooks that video surveillance may occur on district property.

Students or staff in violation of Board policies, administrative regulations, building rules or law shall be subject to appropriate disciplinary action. Others may be referred to law enforcement agencies.

Video recordings may become a part of a student's educational record or a staff member's personnel record. The district shall comply with all applicable state and federal laws related to record maintenance and retention.

Source: Oregon School Boards Association

IX. GENERAL LIABILITY ISSUES

Preventing injury is not only an ethical responsibility, but also a legal obligation. Schools have the responsibility of providing a safe environment for students while they are under their care. The negligent failure to do so will create legal liability for the school.

Regarding students, usually a duty exists while they are in the custody or control of the school. Schools may have a duty to supervise students away from school grounds when they are responsible for them being there, such as while on field trips or extracurricular events.

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Schools may have a duty to supervise students on school grounds before and after school when they are responsible for them being there, such as when the bus drops them off. Schools may acquire a duty to supervise when they have, by their previous actions, assumed the duty to supervise, such as when some staff have supervised intermittently or consistently before official time to arrive. Schools also have a duty to warn of known dangers even when they do not have a duty to supervise.

When a student is a victim of violence at school, the general question will be whether the school had acted reasonably in protecting students against violence and whether the school knew, or should have known, that the offender was violent. If the school district failed to act reasonably, they may be liable for the damages of the violence.

EXAMPLES:

1. The families of three of the victims in the Columbine school shootings have sued two dozen school officials, including Frank DeAngelis, the school principal, teachers and a security guard. The families have stated in their complaints that school officials knew of the two killers' propensity for violence through their schoolwork in writing, psychology and video production classes, and failed to intercede. James Cedarberg, a lawyer representing one of the families, stated that a lot of information was made available by the perpetrators before the incident. However, Rick Kaufman, a spokesman for the Jefferson County School District, said that none of the Columbine employees knew about the students' horrible plans.

2. *Rudd v. Pulaski County Special School Dist.,* 20 S.W.3d 310 (Ark. 2000).
   A parent and family members brought an action against the county school district and its employees, asserting theories of liability under the Civil Rights Act and negligence for the shooting death of their son on a school bus. The court held that the county school district was not liable under the Arkansas Civil Rights Act for the shooting death. The perpetrator, another student, was not a state actor; therefore, there was no custodial relationship between the school district and the perpetrator. Moreover, the school district did not have a duty to protect the victim from the violent acts of another student.

3. Samantha Collins, a 16-year-old former student at Boston University Academy, had been banned from the school's prom for threatening teachers and students. However, she could not remember making the threats and attributed them to a disability she suffers as a result of a serious brain injury from a skiing accident. Collins went to federal court to ask US District Judge Reginald Lindsay to order the school to let her go to the dance. Collins now attends Needham High School, but wanted to attend the Boston University Academy's prom with her boyfriend, a junior at the school. The case was resolved without a court order when the lawyers reached an agreement allowing Collins to attend the prom. Larry Elswit, the attorney representing the school, stated that the school was concerned about her conduct and the feelings of other students who felt her presence would be a threat to them.

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4. A 16-year-old girl attending the Boston Arts Academy obtained a restraining order against two boys who had been sending e-mail death threats to her. School officials had expelled one of the boys and suspended the other. However, Wendy Murphy, the girl's lawyer, felt that the school had not done enough to protect her client and asked Superior Court Judge Nonnie S. Burnes for a restraining order. The restraining order prohibits the boys from communicating with the girl or from being within 100 yards of her inside or outside of the school. Some people feel that schools are not the place for restraining orders, and that they present difficulties for school officials in enforcing them.

5. More than 5,000 bomb threats have been made in the school setting since the Columbine incident, causing disruption, inconvenience and anxiety. Most of the threats have been false alarms, costing local taxpayers up to $40,000 per incident. As a result, a dozen states have passed laws or are considering legislation intended to punish those who make bomb threats against schools. Penalties include expelling students from school, suspending offenders' driving privileges, and requiring parents to pay damages.

6. *State of New Jersey In Interest of G.S.*, 749 A.2d 902, (N.J.Super.Ch. 2000). Under New Jersey law, the Superior Court, Chancery Division, Family Part, had subject matter jurisdiction to determine whether a juvenile delinquent expelled from school for making a bomb threat was stripped of his constitutional right to any form of public education. The Court ruled that the state had the constitutional obligation to provide an education to the juvenile. Accordingly, the state would be directed to provide an alternative school program for the juvenile in order to effectuate its constitutional obligation to furnish him a free public education until he attained his high school diploma or his 19th birthday, whichever occurred first.

7. *Marshall v. Cortland Enlarged City School Dist.*, 265 A.D.2d 782 (N.Y.A.D. 3 Dept. 1999). Parents of a special education student murdered by a fellow student on school grounds brought a wrongful death action against the school district. The court held that the school officials lacked either actual or constructive notice that a special education student was dangerous, and thus the school district was not liable for the death of a fellow student whom the student murdered on school grounds during lunch hour. Although the student had made threats against a former girlfriend during the previous school year, there was no evidence that this information had been passed along to school personnel.

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X. FBI THREAT ASSESSMENT

Three students at Utopia High School get together to create a plan to take over their school and kill their principal and fellow students. Jordan Smith, the alleged ringleader behind the plot, writes a plan to steal a janitor's key, shut off the alarms, and kill the principal and assistant principal. Jordan has a supply of weapons at his home and access to ammunition in his parent's gun cabinet. Recently, Jordan wrote a fictional essay for English class about a boy in another school who killed his fellow classmates and authority figures during a shooting rampage at his school. Kenny Brown, another student involved in the plot, is a quiet, withdrawn student with few friends. He has never resisted school authority, nor has he ever created any problems at the school. Based on a conversation with a guidance counselor, you know that Kenny is largely ignored at home, and spends most of his time playing computer games on the Internet. Lisa Jones, the third student involved in the plot, is the class clown. She is always engaging in behavior to get the attention of others, although she has never done anything violent. Lisa thinks she is superior to most students at the school, and whenever she has been caught in the past, she has pointed the finger at others. Lisa has mentioned to a few of the "popular" kids that there are students planning to take over the school and kill the principal and fellow students.

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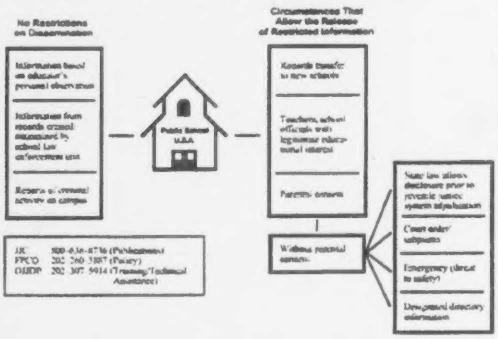
PRIVACY ISSUES & FERPA

- 20 U.S.C. § 1232g
- "Education records"
  all records, files, documents and other materials, such as films, tapes or photographs, containing information directly related to a student that an education agency or institution or a person acting for the agency or institution maintains.

Exceptions to parental consent requirement

- Title 20, Section 1232g(b)(1) [Title 34, CFR Section 99.31]
- General rule:
  - school employees who have a need to know
  - other schools to which a student is transferring
  - certain government officials
  - appropriate parties re: financial aid
  - organizations conducting studies
  - accrediting organizations
  - individuals with court orders or subpoenas
  - health and safety emergency
  - State and local authorities, pursuant to state law

FERPA at a Glance



No Restrictions on Dissemination

- Information based on educator's personal observation
- Information from records created maintained by school law enforcement unit
- Reports of criminal activity on campus

Public School U.S.A.

Circumstances That Allow the Release of Restricted Information

- Records transfer to new schools
- Teachers, school officials with legitimate educational interest
- Parental consent

Without parental consent

- State law allows disclosure prior to juvenile justice system adjudication
- Court order/ subpoena
- Emergency (threat to safety)
- Designated directory information

JJC 800-638-8736 (Publications)
FPCO 202-260-3887 (Policy)
OJJDP 202-307-5914 (Training/Technical Assistance)

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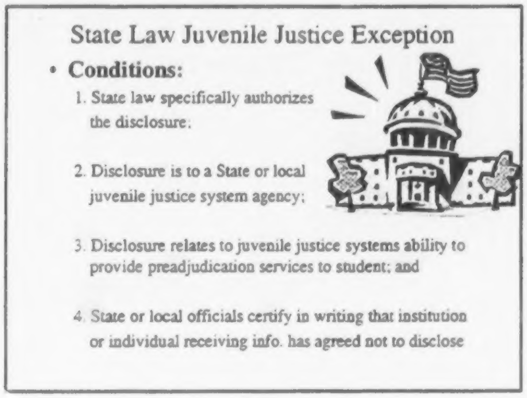
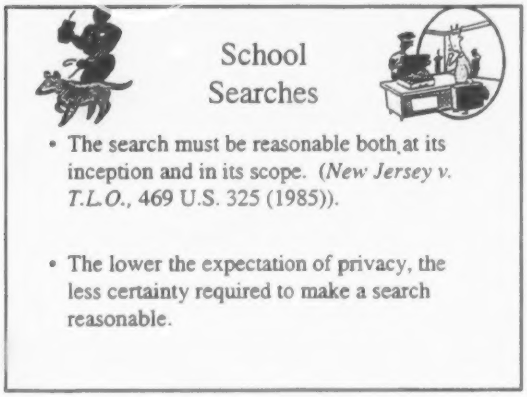


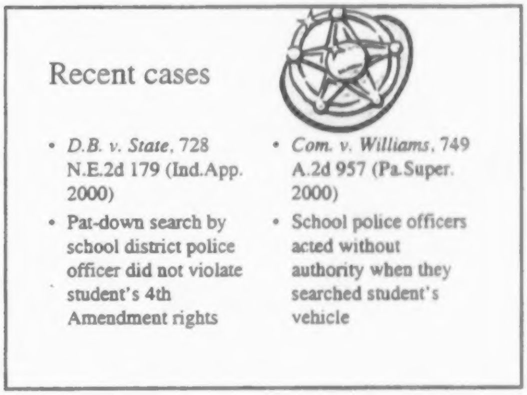
State Law Juvenile Justice Exception

- **Conditions:**
  1. State law specifically authorizes the disclosure;
  2. Disclosure is to a State or local juvenile justice system agency;
  3. Disclosure relates to juvenile justice systems ability to provide preadjudication services to student; and
  4. State or local officials certify in writing that institution or individual receiving info. has agreed not to disclose



School Searches

- The search must be reasonable both at its inception and in its scope. (*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).
- The lower the expectation of privacy, the less certainty required to make a search reasonable.



Recent cases

- *D.B. v. State*, 728 N.E.2d 179 (Ind.App. 2000)
- Pat-down search by school district police officer did not violate student's 4th Amendment rights
- *Com. v. Williams*, 749 A.2d 957 (Pa.Super. 2000)
- School police officers acted without authority when they searched student's vehicle

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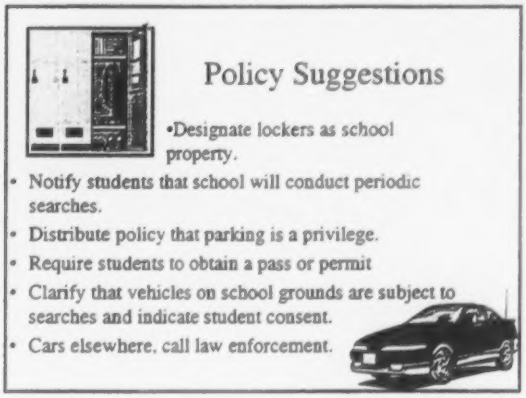
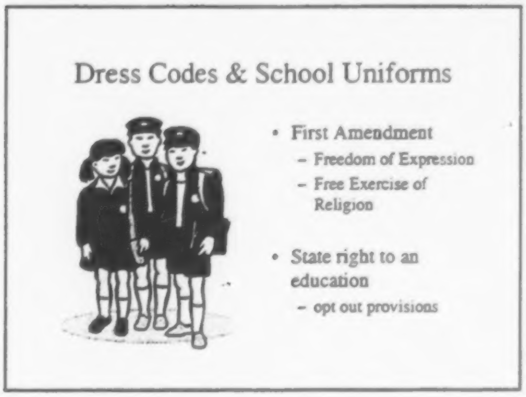


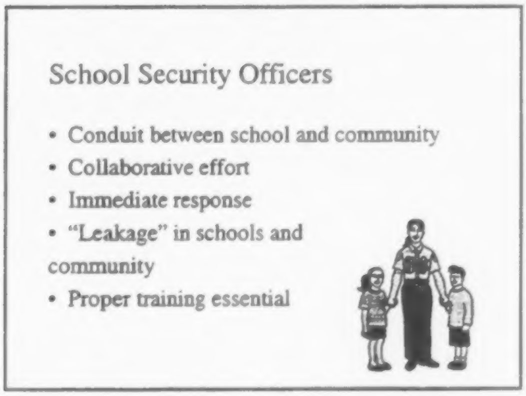
Policy Suggestions

- Designate lockers as school property.
- Notify students that school will conduct periodic searches.
- Distribute policy that parking is a privilege.
- Require students to obtain a pass or permit
- Clarify that vehicles on school grounds are subject to searches and indicate student consent.
- Cars elsewhere, call law enforcement.



Dress Codes & School Uniforms

- First Amendment
  - Freedom of Expression
  - Free Exercise of Religion
- State right to an education
  - opt out provisions



School Security Officers

- Conduit between school and community
- Collaborative effort
- Immediate response
- “Leakage” in schools and community
- Proper training essential

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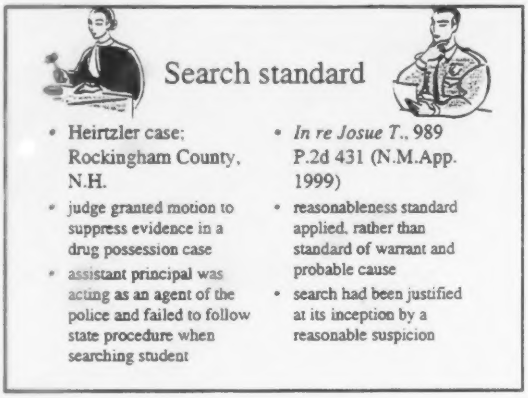
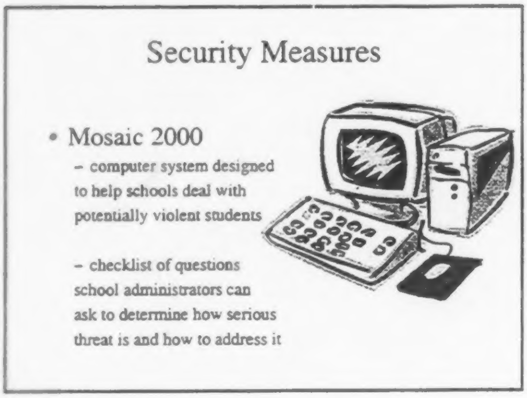


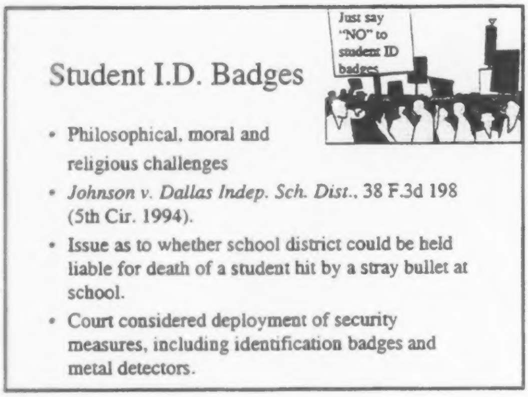
Search standard

- Heirtzler case: Rockingham County, N.H.
- judge granted motion to suppress evidence in a drug possession case
- assistant principal was acting as an agent of the police and failed to follow state procedure when searching student
- *In re Josue T.*, 989 P.2d 431 (N.M.App. 1999)
- reasonableness standard applied, rather than standard of warrant and probable cause
- search had been justified at its inception by a reasonable suspicion



Security Measures

- Mosaic 2000
  - computer system designed to help schools deal with potentially violent students
  - checklist of questions school administrators can ask to determine how serious threat is and how to address it



Student I.D. Badges

Just say "NO" to student ID badges

- Philosophical, moral and religious challenges
- *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198 (5th Cir. 1994).
- Issue as to whether school district could be held liable for death of a student hit by a stray bullet at school.
- Court considered deployment of security measures, including identification badges and metal detectors.

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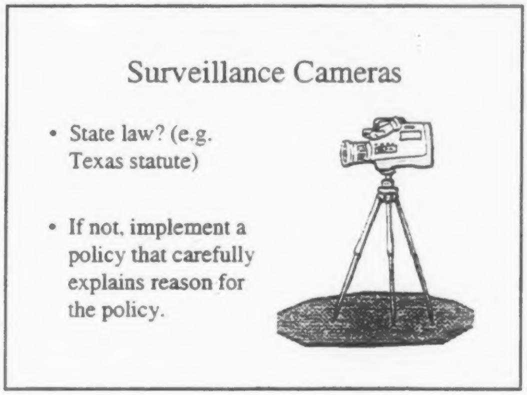
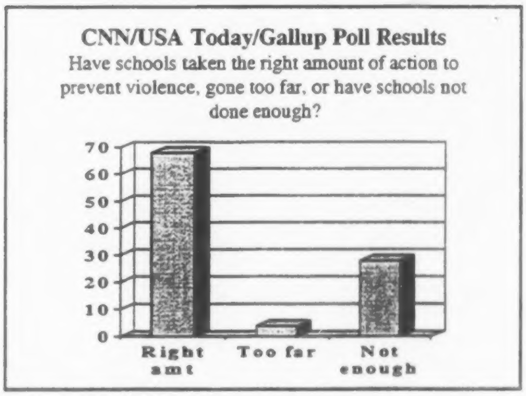
Metal Detectors

- Considerations:
  1. Violate 4th Amendment Rights?
  2. Individualized reasonable suspicion?
- See:
  1. *Thompson v. Carthage School District*, 87 F.3d 979 (8th Cir. 1996)
  2. *People v. Dukes*, 580 N.Y.S.2d 850 (NY Crim.Ct. 1992)



Surveillance Cameras

- State law? (e.g. Texas statute)
- If not, implement a policy that carefully explains reason for the policy.



CNN/USA Today/Gallup Poll Results

Have schools taken the right amount of action to prevent violence, gone too far, or have schools not done enough?

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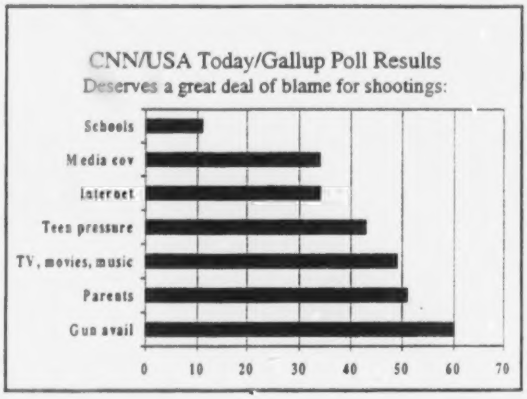
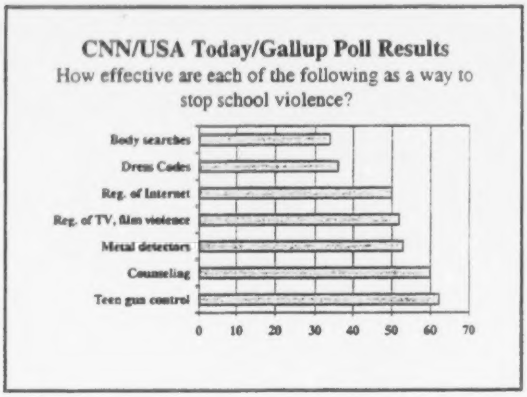
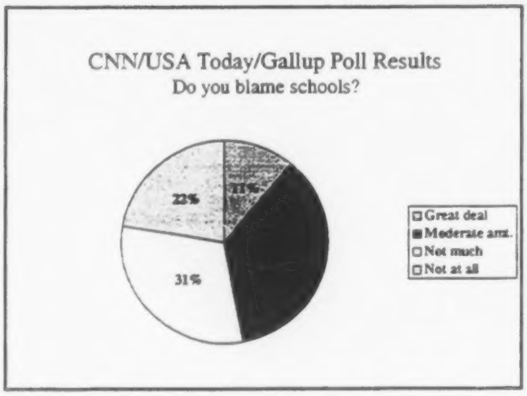


CNN/USA Today/Gallup Poll Results
Deserves a great deal of blame for shootings:



CNN/USA Today/Gallup Poll Results
How effective are each of the following as a way to stop school violence?



CNN/USA Today/Gallup Poll Results
Do you blame schools?

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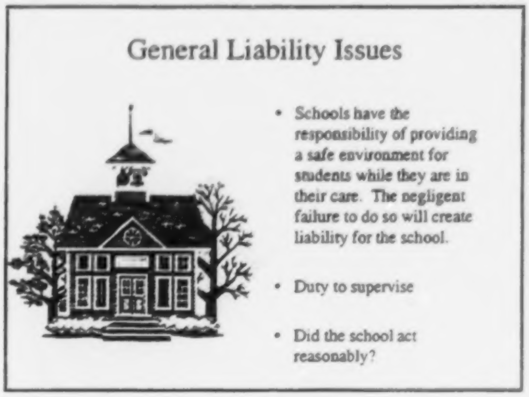
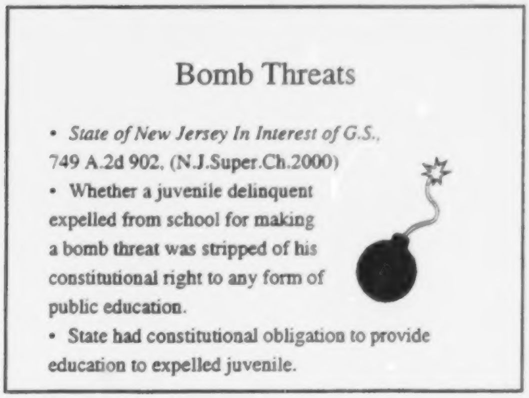


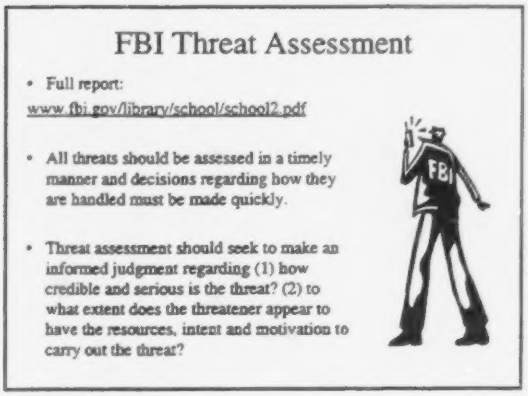
General Liability Issues

- Schools have the responsibility of providing a safe environment for students while they are in their care. The negligent failure to do so will create liability for the school.
- Duty to supervise
- Did the school act reasonably?



Bomb Threats

- *State of New Jersey In Interest of G.S.*, 749 A.2d 902, (N.J.Super.Ch.2000)
- Whether a juvenile delinquent expelled from school for making a bomb threat was stripped of his constitutional right to any form of public education.
- State had constitutional obligation to provide education to expelled juvenile.



FBI Threat Assessment

- Full report: www.fbi.gov/library/school/school2.pdf
- All threats should be assessed in a timely manner and decisions regarding how they are handled must be made quickly.
- Threat assessment should seek to make an informed judgment regarding (1) how credible and serious is the threat? (2) to what extent does the threatener appear to have the resources, intent and motivation to carry out the threat?

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A Summary of the Threat Assessment Model
The School Shooter: A THREAT ASSESSMENT PERSPECTIVE

Author: Mary Ellen O'Toole, PhD
Supervisory Special Agent
Federal Bureau of Investigation

Summary prepared by: Julie E. Lewis, Esq.

ASSESSING THREATS

- All threats should be assessed in a timely manner and decisions regarding how they are handled must be done quickly.

- Threat assessment should seek to make an informed judgment on two questions: how credible and serious is the threat itself? And to what extent does the threatener appear to have the resources, intent and motivation to carry out the threat?

FACTORS IN THREAT ASSESSMENT:

1. Are there specific, plausible details? (Has the individual taken preparatory steps?)
2. Is there emotional content in the threat? (Emotionally charged threats are usually not a measure of danger.)
3. Are precipitating stressors present? (Are there incidents that may have triggered the threat?)

Levels of Risk

1. *Low Level of Threat*: a threat that poses minimal risk to the victim and public safety.
    a. Threat is vague and indirect.
    b. Information contained within the threat is inconsistent, implausible or lacks detail.
    c. Threat lacks realism.
    d. Content of the treat suggests person is unlikely to carry it out.

2. *Medium Level of Threat*: a threat that could be carried out, although it may not appear entirely realistic.
    a. Threat is more direct and more concrete than a low level threat.
    b. Wording in the threat suggests that the threatener has given some thought to how the act will be carried out.
    c. There may be a general indication of a possible time and place (though these signs still fall well short of a detailed plan).
    d. There is no strong indication that the threatener has taken preparatory steps, although there may be some veiled reference or ambiguous or inconclusive evidence pointing to that possibility.
    e. There may be a specific statement seeking to convey that the threat is not empty: "I'm serious!"

3. *High Level of Threat*: a threat that appears to pose an imminent and serious danger to the safety of others.
    a. Threat is direct, specific and plausible.
    b. Threat suggests concrete steps have been taken toward carrying it out, for example, statements indicating that the threatener has acquired or practiced with a weapon or has had the victim under surveillance.

FOUR-PRONGED ASSESSMENT APPROACH

All aspects of a threatener's life must be considered when evaluating whether a threat is likely to be carried out. This model provides a framework for evaluating a student in order to determine if he or she has the motivation, means, and intent to carry out a proclaimed threat. The assessment is based on the "totality of the circumstances" known about the student in four major areas:

1. **Personality of student**; clues to a student's personality can come from observing behavior when the student is:
    - Coping with conflicts, disappointments, failures, insults or other stresses.
    - Expressing anger or rage, frustration, disappointment, humiliation, sadness, or similar feelings.
    - Demonstrating or failing to demonstrate resiliency after a setback, a failure, real or perceived criticism, disappointment, or other negative experiences.
    - Demonstrating how the student feels about himself, what kind of person the student imagines himself to be and how the student believes he appears to others.
    - Responding to rules, instruction, or authority figures.
    - Demonstrating and expressing a desire or need for control, attention, respect, admiration, confrontation, or other needs.
    - Demonstrating or failing to demonstrate empathy with the feelings and experiences of others.
    - Demonstrating his or her attitude toward others.

2. **Family dynamics**- patterns of behavior, thinking, beliefs, traditions, roles, customs and values that exist within the family.

3. **School dynamics and the student's role in those dynamics**- patterns of behavior, thinking, beliefs, customs, traditions, roles and values that exist in a school's culture. Identifying those behaviors that are formally or informally valued and rewarded in a school helps explain why some students get more approval and attention from school authorities and have more prestige among their fellow students. It can also explain the "role" a particular student is given by the school's culture, and how the student may see himself fitting in, or failing to fit in, with the school's value system.

4. **Social dynamics**- patterns of behavior, thinking, beliefs, customs, traditions, and roles that exist in the larger community where students live. An adolescent's beliefs and opinions, his choices of friends, activities, entertainment, and reading material,

and his attitudes toward such things as drugs, alcohol, and weapons will all reflect the social dynamics of the community where he lives and goes to school.

A preliminary assessment should be done on the threat itself. If the threatener's identity is known, a threat assessor quickly collects as much information as is available in the four categories. If the student appears to have serious problems in the majority of the four prongs, and if the threat is assessed as high or medium level, the threat should be taken more seriously and appropriate intervention by school authorities and/or law enforcement should be initiated as quickly as possible.

WARNING SIGNS

This list should not be used as a checklist to predict future violent behavior. Instead, this list should be considered only *after* a student has made some type of threat and an assessment has been developed using the four-pronged model. If the assessment shows evidence of these characteristics, behaviors and consistent problems in all four prongs, it can indicate that the student may be fantasizing about acting on the threat, has the motivation to carry out the violent act, or has actually taken steps to carry out the threat.

Prong One: Personality Traits and Behavior

1. Leakage

   "Leakage" occurs when a student intentionally or unintentionally reveals clues to feelings, thoughts, fantasies, attitudes, or intentions that may signal an impending violent act. These clues can take the form of subtle threats, boasts, innuendoes, predictions or ultimatums. They may be spoken or conveyed in stories, diary entries, essays, poems, letters, songs, drawings, doodles, tattoos or videos. Leakage can be a cry for help, a sign of inner conflict or boasts that may look empty but actually express a serious threat. Leakage is considered to be one of the most important clues that may precede an adolescent's violent act.
2. Low Tolerance for Frustration
3. Poor Coping Skills
4. Lack of Resiliency
5. Failed Love Relationship
6. "Injustice Collector"

   The student nurses resentment over real or perceived injustices. No matter how much time has passed, the "injustice collector" will not forget or forgive those wrongs or the people he believes are responsible.
7. Signs of Depression

   The student shows features of depression such as lethargy, physical fatigue, a morose or dark outlook on life, a sense of malaise, and loss of interest in activities that he once enjoyed.
8. Narcissism
9. Alienation
10. Dehumanizes Others
11. Lack of Empathy
12. Exaggerated Sense of Entitlement
13. Attitude of Superiority

14. Exaggerated or Pathological Need for Attention
15. Externalizes Blame
16. Masks Low Self-esteem
17. Anger Management Problems
18. Intolerance
19. Inappropriate Humor
20. Seeks to Manipulate Others
21. Lack of Trust
22. Closed Social Group
23. Change of Behavior
24. Rigid and Opinionated
25. Unusual Interest in Sensational Violence
26. Fascination with Violence-Filled Entertainment

    The student demonstrates an unusual fascination with movies, TV shows, computer games, music videos or printed material that focus intensively on themes of violence, hatred, control, power, death and destruction. Themes of hatred, violence, weapons and mass destruction recur in virtually all his activities, hobbies and pastimes.
27. Negative Role Models
28. Behavior Appears Relevant to Carrying Out a Threat

    The student appears to e increasingly occupied in activities that could be related to carrying out a threat -- for example, spending unusual amounts of time practicing with firearms or on various violent websites. The time spent on these activities has noticeably begun to exclude normal everyday pursuits such as homework, attending classes, going to work and spending time with friends.

Prong Two: Family Dynamics

1. Turbulent Parent-Child Relationship
2. Acceptance of Pathological Behavior

   Parents do not react to behavior that most parents would find very disturbing or abnormal. They appear unable to recognize or acknowledge problems in their children and respond quite defensively to any real or perceived criticism of their child. If contacted by school officials or staff about the student's troubling behavior, the parents appear unconcerned, minimize the problem or reject the reports altogether, even if the child's misconduct is obvious and significant.
3. Access to Weapons
4. Lack of Intimacy
5. Student "Rules the Roost"

   The parents set few or no limits on the child's conduct, and regularly give in to his demands. The student insists on an inordinate degree of privacy, and parents have little information about his activities, school life, friends or other relationships. The parents seem intimidated by their child. They may fear he will attach them physically if they confront or frustrate him, or they may be unwilling to face an emotional outburst, or they may be afraid that upsetting the child will spark an emotional crisis.
6. No Limits or Monitoring of TV and Internet

Prong Three: School Dynamics

1. Student's Attachment to School

   Student appears to be "detached" from school, including other students, teachers and school activities.
2. Tolerance for Disrespectful Behavior

   The school does little to prevent or punish disrespectful behavior between individual students or groups of students. Bullying is part of the school culture and school authorities seem oblivious to it, seldom or never intervening or doing so only selectively. Students frequently act in the roles of bully, victim or bystander. The school atmosphere promotes racial or class divisions or allows them to remain unchallenged.
3. Inequitable Discipline
4. Inflexible Culture
5. Pecking Order Among Students

   Certain groups of students are officially or unofficially given more prestige and respect than others. Both school officials and the student body treat those in the high-prestige groups as though they are more important or more valuable to the school than other students.
6. Code of Silence

   A "code of silence" prevails among students. Few feel they can safely tell teachers or administrators if they are concerned about another student's behavior or attitude. Little trust exists between students and staff.
7. Unsupervised Computer Access

SCHOOLS SHOULD MAINTAIN DOCUMENTATION OF ALL PRIOR INCIDENTS OR PROBLEMS INVOLVING STUDENTS SO IT CAN BE CONSIDERED IN FUTURE THREAT ASSESSMENTS.

Prong Four: Social Dynamics

1. Media, Entertainment, Technology

   The student has easy and unmonitored access to movies, TV shows, computer games and Internet sites with themes and images of extreme violence.
2. Peer Groups

   The student is intensely and exclusively involved with a group who shares a fascination with violence or extremist beliefs. The group excludes others who do not share its interests or ideas. As a result, the student spends little or no time with anyone who thinks differently and is shielded from the "reality check" that might come from hearing other views or perceptions.
3. Attitude Towards Drugs and Alcohol
4. Outside Interests
5. The Copycat Effect

   School shootings and other violent incidents that receive intense media attention can generate threats or copycat violence elsewhere. Copycat behavior is very common. Anecdotal evidence strongly indicates that threats increase in schools nationwide after a shooting has occurred anywhere in the United States. Students, teachers, school administrators and law enforcement officials should be more vigilant in noting disturbing student behavior in the days and weeks, or even several months, following a heavily publicized incident elsewhere in the country.

THE ROLE OF LAW ENFORCEMENT

In the vast majority of cases, the decision on whether to involve law enforcement will hinge on the seriousness of the threat: low, medium or high, under the criteria outlined earlier in this paper.

Low Level:

A threat that has been evaluated as low level poses little threat to public safety, and in most cases would not necessitate law enforcement investigation for a possible criminal offence. (However, law enforcement agencies may be asked for information in connection with a threat of any level.) Appropriate intervention would involve, at a minimum, interviews with the student and his parents. If the threat was aimed at a specific person, that person should also be asked about his or her relationship with the threatener and the circumstances that led up to the threat. The response, disciplinary action and any decision to refer a student for counseling or other form of intervention should be determined according to school policies and the judgment of the responsible school administrators.

Medium Level:

The response should in most cases include contacting law enforcement agencies, as well as other sources, to obtain additional information (and possibly reclassify the threat into the high or low category).

High Level:

The school should almost always inform the appropriate law enforcement agency immediately. A response plan, which should have been designed ahead of time and rehearsed by both school and law enforcement personnel, should be implement. Law enforcement should be informed and involved in whatever subsequent actions are taken in response to the threat. A high level threat is likely to result in criminal prosecution.

H

HIRING AND RETAINING SUPERINTENDENTS

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INTRODUCTION

It seems as though the last vestiges of democratic control over governmental institutions center around the Board of Education in local school districts. It is on this battleground that citizens believe they control the quality of education delivered to their children, and the government they elect will be truly responsive to the needs of local citizens. Therefore, local educational establishments have become embattled grounds for local controversy, increasing political partisanship, and undue interference with the business of operating a school system.

The centerpiece of this controversy is the school superintendent. Given early retirement incentives encouraged by local teacher organizations, the advent of baby boomers entering into the early retirement market, and a constricted labor market economy for highly trained specialists, it is now a sellers' market rather than a buyers' market for school superintendents.

The purpose of this unit is to acquaint the school law practitioner with devices necessary to select, hire, and retain the school superintendent. This chapter will discuss elements that the school lawyer should be aware of in negotiating with placement firms relative to the eventual contracting of a superintendent, the elements of an effective superintendent's contract, and incentives available to retain the superintendent in employment and to discourage "jumping ship" for greener pastures and fatter wallets.

I. CONCERNS OVER THE SUPERINTENDENT'S CONTRACT WHEN ENGAGING SUPERINTENDENT SEARCH FIRMS

What with the prevalence of executive "search firms" to conduct nationwide searches for the prospective school superintendent, too much time is spent advertising the school district and too little time is spent on focusing on the elements of contracting with the eventually successful search candidate. It is insufficient for a search firm or a school district conducting a search for a superintendent candidate to merely advertise salary ranges; too often, salary is the least significant aspect of attracting and retaining the successful candidate. Job security, fringe benefits, retirement incentives and attainment of performance goals are all vital considerations for the upwardly mobile superintendent.

Therefore, while too little attention is given to the elements of the contract for the successful candidate, the search actually bogs down, and sometimes aborts, over contract discussions after the board of education has selected the front runner.

This scenario causes significant problems for searching boards of education:

1) The board of education, eager to announce to the public the success of its search, identifies the successful candidate without a contract being signed;
2) For the first time during a six-month search, the successful candidate announces that he/she is not satisfied with the brochure advertising the candidacy in which they quote "competitive salary will be offered,;" and
3) Negotiations cause the front runner to withdraw, and the board is left with three other

finalists, all of whom know they have not been nominated as the top candidate, and abandon their efforts to secure employment in this school district. Then the board of education is left with a new search, increasing expenses and the uncertainty of executive leadership.

The foregoing nightmares could and should be easily avoidable by the search firm handing to the finalists a draft of the Superintendent's Contract which the board of education has approved, absent a numerical amount for salary. The terms and conditions of employment are by this time well known to the final candidates, and during the final interviews, the candidates can make known any specific objections to various provisions in the contract, *i.e.*, the requirement the superintendent establish residency within a finite period of time within the geographical boundaries of the school district; the requirement to submit to a medical examination; the requirement that certain student achievement goals be conquered within the first term of the agreement; *etc.*.

Furthermore, the search documents should clearly require that the superintendent, if selected, by required to execute a known and published document determining the specific terms and conditions of employment as a condition of the search. A failure of a candidate to acknowledge such a requirement, could easily lead to elimination and avoid embarrassment for the board of education in the crucial final hours before selection and public announcement.

II. WITH WHOM THE EMPLOYING BOARD NEGOTIATES A CONTRACT

Recently one of our firm's clients was a nationally known and prominent superintendent who accepted the City of Chicago School Superintendency. Rather than negotiate the terms and conditions of the employment agreement herself, she nominated her attorney to negotiate the Superintendent's Contract directly with the Board of Education's attorney. While this led to curious askance views by the Board of Education members, it was a deliberate and very well thought out device. Often, board of education members are somewhat avuncular and pre-possessive when their claim ruptures the honeymoon by announcing he has an attorney. Boards should by advised that it is common for pre-contracting parties to be represented by attorneys. The school superintendent is usually schooled in the business of administration, and not contract law. Furthermore, since the Board of Education has ready-access to its own attorney, contract negotiations is often a task that boards of education liken to taking out the trash; they have trash men to accomplish the task. In the above-cited example, when the first controversy arose between the Chicago Board of Education and its Superintendent, a board member Ryly observed to the Superintendent, "This was never mentioned when you held us up in contract negotiations." The Superintendent, whose tenure was at that time only three months, cleverly shot back "excuse me, but I did not negotiate my contract; I used a professional, as did you. Please don't revive any acrimony from those negotiations because they were handled by the professionals for both parties."

At quick and sudden swoop, the Superintendent had clearly insulated herself from any of the ruffled feathers which occurs when contracting parties, at arms length, sincerely put forth their demands and their concessions. The controversy quickly subsided.

Contracting boards of education should be similarly aware and should encourage the superintendent-elect to have his/her lawyers negotiate with the board of education's lawyer the open items left in the employment relationships. This will allow the new superintendent to assume office and perform the duties thereof untarnished with negotiations' waste.

III. LETTERS OF INTENT

Sadly, search firms will inform boards of education that a formal contract is not required to make the official announcement of the selection of a new candidate. In 32 states, letters of intent do not form binding contracts obligating either party to the relationship. Furthermore, the uncertainty and nascent formal relationship between the board and the superintendent creates doubt in the minds of the media and keeps alive the question of the terms and conditions of the superintendent's contract prior to extension; the press eagerly awaits the actual document and gives greater attention to it than is otherwise necessary.

All too often, letters of intent become unenforceable because of the lack of specifics as to duration, compensation and duties to be performed. It is gainsaid that boards of education examine a contract for software services or copy machines prior to obligating themselves, primarily to know the nature of the bargain. How could things be any different than when hiring a school superintendent?

Finally, since in nearly every state a superintendent's employment agreement is discoverable under Sunshine Laws, Freedom of Information Acts or governmental document legislation, it is far better to release the document unsigned, and with blanks in it than it is to wait with anticipation what secrets are contained therein.

IV. ELEMENTS OF THE SUPERINTENDENT'S AGREEMENT

What follows in the text are various sample provisions of a model superintendent's agreement. Various parts have been amended from the American Association of School Administrators, various state school board associations, and the tried-and-true language from various practitioners and competitors. The language is designed as a guide only, and not the provision of legal or tax advice. Each school practitioner should feel free to use, amend, and embellish the language. The comments provided after the language point the practitioner to various considerations relative to the use and amendment of specific terms and phrases used.

1. PREAMBLE:

THIS AGREEMENT is made this _____ day of _______________, ______, by and between the BOARD OF EDUCATION, _______________ SCHOOL DISTRICT NO. _____, _______ COUNTY, ILLINOIS (the "BOARD"), and _______________________ ("SUPERINTENDENT"), has been approved by a resolution adopted at the meeting of the BOARD held on __________________, _____, and, is appended to the Minutes of said meeting.

IT IS AGREED:

COMMENT:

There are two key provisions to the pre-ambulatory language of a superintendent's contract:

1) The effective day of the contract because it rarely coincides with the date of adoption; and

2) The notion of when the contract was adopted by resolution of a board of education meeting.

While seeming elementary, these two provisions actually have given rise to significant litigation. The effective date of the contract will determine whether or not the annual compensation is prorated, and will actually define the length of term of the agreement, irrespective of the date of adoption, and provide a reference that the board of education cannot escape, namely that the contract was adopted at a regular or special meeting of the board of education and is appended to the minutes of the meeting so as to prove authenticity.

The authors have litigated at least one dozen cases involving whether or not the agreement the parties thought they were operating under was the agreeme[illegible]pted by the board and the legality of the length of the contract, sometimes set by state law as not to exceed certain maximum periods of time, and a later disgruntled board of education attempting to claim that the contract was too long, thereby violative of state laws.

2. RETENTION

1. EMPLOYMENT - The SUPERINTENDENT is hereby hired and retained from ____________________, _____ through and including ________________________, ______, and, as it may be later agreed to by the parties, thereafter, as Superintendent of Schools and Chief Executive Officer of the School District.

COMMENT:

This provision actually adopts the length of the term of the agreement, recognizing it may be extended by agreement of the parties. It is the provision of the contract which will validate the contract under state statutes which will provide minimum and maximum terms of employment.

3. DUTIES:

2. DUTIES - The duties and responsibilities of the SUPERINTENDENT shall be those incidental to the office of the Superintendent of Schools, those set forth in the job description (or, those duties contained in Board Policy, as adopted, and which may be amended from time to time). the attainment of the student performance and academic improvement goals set forth in this Agreement those obligations imposed by the laws of the State of __________ upon the SUPERINTENDENT, and to perform other professional duties customarily performed by a Superintendent of Schools as from time to time may be assigned to the SUPERINTENDENT by the BOARD. The SUPERINTENDENT shall have charge of the administration of the School District under the policies of the BOARD. He shall direct and assign, place and transfer all employees, and shall organize and administer the affairs of the School District as best serves the School District consistent with Board Policy. He shall from time to time suggest regulations, rules and procedures deemed necessary for the well-ordering of the School District. The BOARD reserves the right to reassign the SUPERINTENDENT to different duties from time to time during the term of this Agreement, without a loss of pay.

COMMENT:

The key phrase for the protection of the superintendent is the clause, "... and to perform other professional duties customary performed by a Superintendent of Schools as from time to time may be assigned ..." Without this language in the agreement, a number of federal court cases have held that the superintendent has no fourteenth amendment property interest and a claim to the performance of the duties of the superintendent of schools except as otherwise provided in the written agreement. Without this clause, the board could amend board policy to indicate that the superintendent is now the chief custodian of the behaviorally disturbed alternative school, and thereby defeat the purposes of continuing to employ the superintendent in a time of trial. Please note that the shaded language contemplates that board of education will be entering into performance agreements between the superintendent with superintendents providing that the agreement is conditioned upon the attainment of certain achievements in the field of student performance and achievement testing.

The practitioner should also note in the last sentence that the board reserves the right specifically to reassign the superintendent provided no loss of pay. This sentence is particularly important if the relationship sours; when faced with the virtual certainty of an execution, boards often balk at paying the superintendent off. More about this later under "Liquidated Damages and Severance Provisions." However, by reserving the right to reassign the superintendent at no loss of pay allows the board to call the superintendent a consultant regarding board of education matters, by remaining at home in his bedroom, provided there is no loss of pay. Often, it is a face saver for boards that "cannot pull the plug."

4. STUDENT PERFORMANCE/ACADEMIC IMPROVEMENT:

> **3. STUDENT PERFORMANCE AND ACADEMIC IMPROVEMENT - This Agreement is a performance-based contract. The SUPERINTENDENT shall meet the following student performance and academic improvement goals during the term of this Agreement, which the parties agree are goals which are linked to student performance and academic improvement within the schools of the District:**
>
> **(List goals here)**
>
> **The foregoing goals shall be used by the BOARD to measure the performance and effectiveness of the SUPERINTENDENT, along with such other information as the BOARD may determine.**
>
> **3. STUDENT PERFORMANCE AND ACADEMIC IMPROVEMENT - This Agreement is a performance-based contract. Student performance and academic improvement goals shall be established by the mutual agreement of the SUPERINTENDENT and the BOARD, and approved and determined by the BOARD, during the first year of this Agreement. Said goals, once approved and determined by the BOARD, shall be incorporated into and made a part of this Agreement. The SUPERINTENDENT shall meet all of said goals during the second year of this Agreement, or during such other time period as the SUPERINTENDENT and the BOARD may agree. All of said goals shall be linked to student performance and academic improvement within the school or schools of the District. The foregoing goals shall be used by the BOARD to measure the performance and effectiveness of the SUPERINTENDENT, along with such other information as the BOARD may determine.**

3. STUDENT PERFORMANCE AND ACADEMIC IMPROVEMENT - This Agreement is a performance-based contract. The SUPERINTENDENT shall address and fulfill student performance and academic improvement goals which shall be developed by the BOARD and the SUPERINTENDENT cooperatively within three months of the beginning of this Agreement and appended to this Agreement and made a part hereof. Once the student performance and academic improvement goals have been attained, this Agreement may be extended. For each succeeding school year, new student performance and academic improvement goals shall be developed, appended to this Agreement within three months of the beginning of the next school year and made a part hereof.

COMMENT:

Many states (as of the time and writing of this article, nine) have adopted requirements that multi-year agreements between boards of education and school superintendents be conditioned upon the attainment by the superintendent as certain performance assessment attainments during its original term, as a condition precedent to extension or renewal. The following are provided as examples only and do not deal with the substantive debate now raging as to whether the school superintendent should be held to a performance standard measured by student assessment. During the presentation of these materials to the advocacy workshop, the speaker will address some of the issues attendant in this analysis, and the same have not been set forth in this outline because of divergence from the topic.

However, in states with labor statutes, practitioners should remember that student performance assessments and goals in superintendent contracts have been mandatory topics of bargaining between the exclusive bargaining representatives and board of education. Therefore, the board should be warned that by placing the superintendent under a performance-assessment contract, since the union and its members will be primarily responsible for the attainment of these goals, the board should expect a demand to bargain over the impact of such contracts given the superintendents.

5. COMPENSATION:

4. COMPENSATION - In consideration of the annual compensation of ______________________________ ($____________), the SUPERINTENDENT agrees to devote such time, skill, labor and attention to his employment, during the term of this Agreement, in order to faithfully perform the duties of Superintendent of Schools. Compensation shall be paid in equal installments in accordance with the BOARD policy governing payment of salary to other certificated members of the professional staff, less such amounts as provided for in this Agreement, and other amounts required by law. The BOARD retains the right to adjust the annual compensation, salary, and/or fringe benefits of the SUPERINTENDENT during the term of this Agreement, and thereafter, provided that any compensation, salary, and/or fringe benefits adjustment(s) shall not be lower than the annual compensation, salary, and fringe benefits paid by the BOARD as stated in this Agreement. Any adjustment in salary and fringe benefits made during the life of this Agreement shall be or presently is in the form of an amendment and shall become a part of this Agreement; provided, however, that it shall not be considered that the BOARD has entered into a new agreement with the SUPERINTENDENT nor that the termination date of this Agreement has been in any way extended. The BOARD and the SUPERINTENDENT, however, may enter into subsequent agreements or extensions of this Agreement for additional periods of time, if all of the student performance and academic improvement goals set forth in this Agreement have been met, (strike if a one-year contract) both parties should agree, and said agreement is reduced to writing.

COMMENT:

The word "compensation" is a tax term of art. Please note that it is not equivalent to salary, as salary is always the taxable figure reported to the *Internal Revenue Service* by the employer. Actually, compensation is generally the grossed up amount of compensation paid to the superintendent, which may be reduced to the form of salary and taxable compensation to the superintendent by devices used throughout this agreement.

Lawyers should also note that there is a provision in this paragraph which does not allow the board of education to adjust downward not only the compensation or salary of the superintendent in subsequent years, but also not to reduce downward the fringe benefits and other forms of compensation paid to the superintendent. This is especially important when boards of education provide moving expenses in the first year of an agreement with the superintendent, relocation expenses, reimbursement for points paid for a home mortgage or a signing bonus. If these items of fringe benefits are not contemplated to be renewed in subsequent years of the agreement, an exception should be provided in this part of the agreement between the superintendent and the board of education.

6. DEFERRED COMPENSATION:

> **5. DEFERRED COMPENSATION - The BOARD may elect to establish a non-qualified deferred compensation plan on behalf of the SUPERINTENDENT in accordance with the then-applicable provisions, regulations and procedures of the Internal Revenue Service. The BOARD shall retain the ownership of the plan. The plan shall be the property of the BOARD, subject to the claims of the general creditors of the BOARD and the SUPERINTENDENT shall have no claim or right to ownership of said plan, or to pledge, assign, or hypothecate the deferred payments thereunder.**

> **5. DEFERRED COMPENSATION - The SUPERINTENDENT may elect that a portion of his compensation (as stated in Section 4) be used to purchase a tax sheltered annuity pursuant to Section 403(b) of the *Internal Revenue Code of 1986* (the "Code"), as amended, and/or a deferred compensation plan pursuant to Code Section 457. It is understood and agreed that the cost of the purchase of any annuity or plan shall be deducted from the SUPERINTENDENT'S annual compensation and shall not require an expenditure of funds by the BOARD above the amount paid to the SUPERINTENDENT in the form of salary, except as may be later amended by the BOARD through the establishment of a non-contributory plan of deferred compensation.**

> **5. DEFERRED COMPENSATION - The SUPERINTENDENT may, at his option, elect to take a reduction in his current salary, or forego a portion of any increase to the compensation paid to him under this Agreement, and have those amount(s) contributed by the BOARD on his behalf to a tax sheltered annuity qualified under Section 403(b) of the *Internal Revenue Code of 1986* (the "Code"), as amended. The amount contributed by the BOARD shall not exceed an amount equal to the maximum allowable contribution under the Code. This provision is intended to be a Salary Reduction Agreement as defined by the Code.**

5. DEFERRED COMPENSATION - In addition to the compensation paid to the SUPERINTENDENT under Section 4 of this Agreement, the BOARD shall pay to him the additional sum of ______________________________ Dollars ($_______), (for a total of ______________________________ Dollars ($________)) and the SUPERINTENDENT shall elect to have that additional ______________________________ Dollars ($________) amount immediately reduced from his/her salary and used to purchase a tax sheltered annuity pursuant to Section 403(b) of the *Internal Revenue Code of 1986* (the "Code"), as amended. It is understood and agreed that the cost of the purchase of the annuity shall be deducted from the SUPERINTENDENT'S annual compensation (which shall include the amount set forth in this section) and shall not require an expenditure of funds by the BOARD above the amount paid to the SUPERINTENDENT in the form of salary (inclusive of the sum set forth in this section), except as may be later amended by the BOARD through the establishment of a non-contributory plan of deferred compensation.

COMMENT:

In the first three paragraphs of the proposed "Deferred Compensation" language, it is anticipated that the superintendent shall elect, within the limits provided by law, that a portion of his otherwise taxable salary will be reduced by a "cash or deferred arrangement." ("CODA").

The last sample of deferred compensation language is designed for an employer-funded annuity under Section 403(b) of the *Internal Revenue Code of 1986, as amended*. Please note that the amount which the board may contribute to an employer-funded annuity is not subject to the same limitations as the amount by which the employee may defer part of his/her creditable compensation for purposes of tax-sheltered annuity.

7. EVALUATION:

6. EVALUATION - The BOARD and SUPERINTENDENT agree that there shall be an annual evaluation of the SUPERINTENDENT'S performance under this Agreement. The evaluation shall consider, but not be limited to, an examination of the establishment and maintenance of

educational goals, attainment of the student performance and academic improvement goals set forth in this Agreement (strike if a one-year contract), administration of personnel, rapport with School Board and other factors of appraisal that may be established by the parties. A written summary of each performance evaluation shall be prepared by the BOARD, or its designee, and given to the SUPERINTENDENT. The parties may elect to meet and confer on the evaluation prior to the preparation of the written summary. Failure by the BOARD to complete an evaluation does not preclude the SUPERINTENDENT'S dismissal, or nonrenewal of this Agreement.

6. EVALUATION - At least annually, but not later than April 1 of each school year, the BOARD shall review the SUPERINTENDENT'S progress toward established goals, attainment of the student performance and academic improvement goals set forth in this Agreement (strike if a one-year contract), and working relationships with the BOARD, the total staff and the Community and shall provide the SUPERINTENDENT with a written summary of that review and shall consider and negotiate the SUPERINTENDENT'S annual compensation and benefits for the next contract year.

COMMENT:

Note that in the first proposed paragraph regarding evaluation, the last sentence does not require the evaluation as a condition precedent to the board of education disciplining or discharging the superintendent. Often, superintendent associations are misled by arguing, all too frequently, that the board has breached its obligation to evaluate the superintendent, and therefore may take no adverse action against him/her.

In no event should the agreement provide that the evaluative document is to be agreed on, in writing, prior to its implementation and effective consequence.

8. CERTIFICATE:

7. CERTIFICATE - The SUPERINTENDENT shall furnish to the BOARD, during the term of this Agreement, a valid, appropriate, and properly registered certificate to act as Superintendent of Schools, in

accordance with the laws of the State of ______ and as directed by the BOARD.

COMMENT:

Given the spate of certification amendments being proposed and enacted by various state legislatures, the practitioner should be advised that this contract provision would need extensive revision with the advent of hiring "CEOs" or retired military or business leaders of school systems.

9. OTHER WORK:

8. OTHER WORK - With the prior agreement of the BOARD, the SUPERINTENDENT may undertake consultation work, speaking engagements, writing, teaching a college or university course, lecturing, or other professional duties and obligations. Provided, however, that this other work shall not interfere in a material and substantial manner with the SUPERINTENDENT'S obligations set forth in this Agreement.

COMMENT:

It is specifically vague and ambiguous in this provision as to who determines whether the superintendent's outside work interferes in a material and substantial manner with the superintendent's obligations. One agreement in great currency in the mid-west provides that "provided that such absence is not conspicuous," referring to the superintendent's absence because of the outside work. Oftentimes we opine as to when the superintendent's absence would otherwise not be conspicuous.

10. DISABILITY:

9. DISABILITY - Should the SUPERINTENDENT be incapable of performing his duties and obligations under this Agreement by reason of illness, accident, or other disability, and that disability is continuous for a period of time in excess of accumulated sick leave and vacation benefits due and owing the SUPERINTENDENT, the BOARD shall cause to be paid to the SUPERINTENDENT any benefits that may be payable under a contract of Long Term Disability Pay to be purchased by the BOARD at its sole expense (*optional* - the BOARD shall continue the SUPERINTENDENT'S full pay for a period of ninety (90) calendar days after exhaustion of those benefits). The Long Term Disability contract shall provide an income continuation benefit equal to at least two-thirds (2/3) of the amount specified in Section 3 of this Agreement, when coordinated with any other benefits to which the SUPERINTENDENT may be entitled, and shall insure the SUPERINTENDENT for the performance of his professional duties during the term of this Agreement. At the termination of this Agreement, the SUPERINTENDENT may elect to receive ownership of the Long Term Disability contract; provided, in that event, he shall be required to pay all subsequent premiums at his sole expense.

The limitations of pay in this section which exist after the exhaustion of sick leave and vacation benefits shall not apply in cases of injuries sustained during the course of the SUPERINTENDENT'S employment which are compensable under any applicable Workers' Compensation Statute. In that case, in addition to any benefits provided under that law, the BOARD shall be obligated to make all payments specified in the preceding paragraph.

COMMENT:

The best disability provisions require the board of education to insure for such an event by purchasing a disability policy insurance policy. This is a relatively inexpensive way for a board of education to insure against a catastrophic illness or accident suffered by the superintendent and provide it significant protection. It also avoids ADA liability issues and provides an independent arms-length third party determination of disability.

11. TERMINATION OF AGREEMENT:

10. TERMINATION OF AGREEMENT - This Agreement may be terminated by:

A. Mutual agreement of the parties.

B. Retirement.

C. Resignation, provided, however, the SUPERINTENDENT gives the BOARD at least ninety (90) days written notice of the proposed resignation.

D. Discharge for cause. "For cause" shall mean any conduct, act, or failure to act by the SUPERINTENDENT which is detrimental to the best interests of the School District. Reasons for discharge for cause shall be given in writing to the SUPERINTENDENT, who shall be entitled to notice and a hearing before the BOARD to discuss those causes. If the SUPERINTENDENT chooses to be accompanied by legal counsel, he shall bear any costs therein involved. The BOARD hearing shall be conducted in closed session. The BOARD will not arbitrarily or capriciously call for the dismissal of the SUPERINTENDENT.

E. Failure to comply with the terms and conditions of this Agreement.

F. Failure to attain the student performance and academic improvement goals set forth in this Agreement. (Strike if a one-year contract).

G. The SUPERINTENDENT'S permanent disability or incapacity, at any time after the SUPERINTENDENT has exhausted his accumulated sick leave and either has been absent from his employment for a continuous period of three (3) months or presents to the BOARD a physician's statement certifying that he is permanently disabled or incapacitated. All obligations of the BOARD shall cease upon written note of termination for permanent disability or incapacity, provided that the SUPERINTENDENT Shall be entitled to a hearing before the BOARD if he so requests. The BOARD reserves the right to require the SUPERINTENDENT to submit to a medical examination, either physical or

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mental, whenever the BOARD deems the SUPERINTENDENT disabled. Such examination shall be performed by a physician licensed to practice medicine in all its branches, who is selected and paid for by the BOARD.

Nothing shall prohibit the BOARD from suspending the SUPERINTENDENT without pay pending completion of the requirements of this section. After the effective date of dismissal the SUPERINTENDENT shall not be entitled to further payments of compensation of any kind under this Agreement, except that the SUPERINTENDENT shall be entitled to any vested benefits payable under the terms and provisions of the Teachers' Retirement System.

COMMENT:

This section is self-explanatory with two caveats.

First, Section E has been provided which is regrettably absent in most agreements providing for a remedy upon breach of the covenants of the agreement. Second, disability is engrafted as cause, pre-supposing that the board has entered into an agreement providing for disability coverage for the superintendent.

Furthermore, it is important to note that the last paragraph would pre-empt most law suits during the process by which a board of education terminates its superintendent.

12. PROFESSIONAL ACTIVITIES:

11. PROFESSIONAL ACTIVITIES - The SUPERINTENDENT shall be encouraged to attend appropriate professional meetings and continuing education at the local, state and national levels. Within budget constraints, as approved by the BOARD, the costs of attendance shall be paid by the BOARD.

COMMENT:

The key is the approval by the board.

13. VACATION:

12. VACATION - The SUPERINTENDENT shall receive twenty-five (25) work days of vacation annually, exclusive of weekends and legal holidays. Vacation days shall be cumulative to the extent that unused vacation days earned during a given year may be carried over for use during the next three (3) months of the succeeding year. The scheduling of more than five (5) consecutive vacation days shall be by agreement between the BOARD and the SUPERINTENDENT. At the SUPERINTENDENT'S sole option, he may exchange a maximum of ten (10) accumulated vacation days annually for payment in lieu of using the vacation days. The SUPERINTENDENT must give written notice to the BOARD of his intention to exercise this option no later than June 15 of any year.

12. VACATION - The SUPERINTENDENT shall receive twenty (20) work days of vacation annually, exclusive of weekends and legal holidays. Vacation shall be taken within twelve (12) months of the year in which it is earned and shall not be cumulative. Vacation may not be taken in periods of time in excess of ten (10) consecutive calendar days. Vacation may not be taken when school is in session.

12. VACATION - The SUPERINTENDENT shall receive twenty (20) work days of vacation annually. The SUPERINTENDENT will advise the President of the BOARD in advance of any vacation period to extend beyond two (2) work days and the time thereof. If a vacation request exceeds five (5) days, the proposal must receive BOARD pre-approval. The SUPERINTENDENT shall take vacation only in the calendar year in which it is earned and unused vacation days will be paid to the SUPERINTENDENT on a per diem basis (1/260) in July of each year. The SUPERINTENDENT shall also be entitled to time off on all school holidays. Spring, summer and Christmas non-student attendance periods shall constitute work days unless specifically scheduled and credited toward the vacation listed above.

COMMENT:

Buried within the first paragraph on vacation is the opportunity for the superintendent to "cash in" on vacation time annually for a per diem salary reimbursement. For players who do not wish to allow employees to pyramid accumulated vacation, this is an effective way to grant superintendent's raises that are "hidden". For each day of cashed-in vacation, the superintendent actually receives a raise equal to .0555 of his/her annual salary. Therefore, a board of education can keep compensation static from year-to-year, and by the provision of ten (10) extra vacation days which can be cashed in annually, provide the superintendent a raise of 5 ½%.

14. VACATION AND SICK LEAVE:

12. VACATION - The SUPERINTENDENT shall receive twenty-five (25) work days of vacation annually, exclusive of weekends and legal holidays. Vacation days shall be cumulative to the extent that unused vacation days earned during a given year may be carried over for use during the next three (3) months of the succeeding year. The scheduling of more than five (5) consecutive vacation days shall be by agreement between the BOARD and the SUPERINTENDENT. At the SUPERINTENDENT'S sole option, he may exchange a maximum of ten (10) accumulated vacation days annually for payment in lieu of using the vacation days. The SUPERINTENDENT must give written notice to the BOARD of his intention to exercise this option no later than June 15 of any year.

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12. VACATION - The SUPERINTENDENT shall receive twenty (20) work days of vacation annually. The SUPERINTENDENT will advise the

President of the BOARD in advance of any vacation period to extend beyond two (2) work days and the time thereof. If a vacation request exceeds five (5) days, the proposal must receive BOARD pre-approval. The SUPERINTENDENT shall take vacation only in the calendar year in which it is earned and unused vacation days will be paid to the SUPERINTENDENT on a per diem basis (1/260) in July of each year. The SUPERINTENDENT shall also be entitled to time off on all school holidays. Spring, summer and Christmas non-student attendance periods shall constitute work days unless specifically scheduled and credited toward the vacation listed above.

COMMENT:

These provisions are fairly standard and provide examples for cashing in on sick leave upon retirement or resignation.

15. HOSPITALIZATION/MAJOR MEDICAL INSURANCE:

13. HOSPITALIZATION/MAJOR MEDICAL INSURANCE - The BOARD shall provide and pay the premiums for hospitalization, major medical and dental insurance for the SUPERINTENDENT, his spouse and the dependent members (as defined by the contract of insurance then in effect) of his immediate family during the term of this Agreement, in accordance with the basic insurance coverage provided to certificated members of the professional staff. The SUPERINTENDENT shall have the option, at his sole discretion, to enroll himself, his spouse and the members of his immediate family in an HMO of his choice. The BOARD shall pay the HMO premiums in an amount not to exceed that which would be required to provide health benefits under the foregoing basic insurance coverage, and shall also provide and pay for any "zero prescription drug option" offered by that HMO.

COMMENT:

Since most chief executive officers receive the full cost of such insurance, (sometimes including dental), no provision is made for a flexible benefit plan in this contract language.

16. TERM LIFE INSURANCE:

14. TERM LIFE INSURANCE - The BOARD shall provide and pay the premiums for a term life insurance policy for the SUPERINTENDENT during the term of this Agreement in the face amount of ______________________________ DOLLARS ($____________). The BOARD shall assign the ownership of the term life insurance policy to a person or trust designated by the SUPERINTENDENT, and upon termination of this Agreement shall allow that owner to continue life insurance policy at its (or his) own expense.

COMMENT:

Please note that the ownership of the policy is designated by the superintendent, whether to a trust or to a person. This provision has been added to provide cheap estate tax planning for the superintendent as if he designates the ownership of the policy to a trust or a third party, the proceeds of the life insurance will not be an incident of ownership on his/her death.

17. TRANSPORTATION EXPENSE:

15. TRANSPORTATION EXPENSE - The BOARD will provide an automobile for the use of the SUPERINTENDENT. The BOARD shall purchase appropriate automobile liability insurance and be responsible for all costs and expenses in the maintenance and repair of the vehicle. The BOARD shall reimburse the SUPERINTENDENT for all other reasonable automobile expenses. The SUPERINTENDENT shall be required, as a condition of employment, to use an automobile to visit the sites of schools, attend BOARD and community functions, and to attend conferences, meetings and workshops. The parties acknowledge and agree that certain use of that automobile constitutes commuting expenses or personal use and therefore constitutes taxable compensation. The parties shall audit the SUPERINTENDENT'S use of the automobile and annually assess the taxable compensation attributable to the SUPERINTENDENT using then-applicable rules and procedures of the IRS. The SUPERINTENDENT is required to provide the BOARD with written substantiation of reimbursement amounts intended to be non- taxable, as required by the *Internal Revenue Code of 1986*, as amended, and its implementing regulations.

15. TRANSPORTATION EXPENSE - As a condition of employment, the SUPERINTENDENT shall be required to provide, at his sole expense, a personally owned or leased automobile for use in his duties. The BOARD shall provide the SUPERINTENDENT with a travel allowance of $_____ per month for necessary business travel within __________ County. The BOARD shall reimburse the SUPERINTENDENT during the term of this Agreement for necessary automobile travel outside __________ County at the rate of __________ cents ($._____) per mile, upon submission of appropriate substantiation of those expenses by the SUPERINTENDENT. The SUPERINTENDENT shall submit appropriate substantiation of all expenses incurred in all business travel; to the extent that this allowance is unsubstantiated, it shall be included in the SUPERINTENDENT'S taxable income. The SUPERINTENDENT shall pay for such use, including, but not limited to, license, sticker fees, fuel, repairs, parking, tolls and insurance.

15. TRANSPORTATION EXPENSE - As a condition of employment, the SUPERINTENDENT is required to purchase a personally owned automobile or other vehicle for business purposes. As the SUPERINTENDENT shall be required to travel between campuses and make other business related trips including, but not limited to, meetings with School District representatives, attorneys, auditors, parents and constituents, it is recognized that the SUPERINTENDENT will incur certain expenses of a business nature for the use of said vehicle. Therefore, the BOARD shall reimburse the SUPERINTENDENT the annual sum of ______________________________ Dollars ($______________) payable monthly, for the business use of said vehicle. The SUPERINTENDENT shall submit appropriate substantiation of all business expenses incurred. To the extent that this allowance is unsubstantiated, it shall be included in the SUPERINTENDENT'S taxable income. The SUPERINTENDENT shall bear all costs associated with the purchase, upkeep and maintenance of said vehicle.

COMMENT:

The provisions here are designed to comport with the 1992 tax reform amendments. Since the first trip of the day and the last trip home is usually commuting, and if the board of education provides the superintendent a vehicle plus the payment of the expenses, at arms-length, the parties must establish what amount of this benefit is otherwise taxable to the superintendent.

18. MEDICAL EXAMINATION:

16. MEDICAL EXAMINATION - At least once during the term of this Agreement, the SUPERINTENDENT shall obtain a comprehensive medical examination, the actual cost of which shall be paid by the BOARD. A copy of the examination or certificate of the physician certifying the physical ability of the SUPERINTENDENT to perform his essential job functions shall be given to the President of the BOARD. The physician performing the medical examination shall be one licensed to practice medicine in all of its branches and shall be chosen by the BOARD, or by mutual agreement of the BOARD and SUPERINTENDENT.

16. MEDICAL EXAMINATION - The SUPERINTENDENT shall, on or about July 1st of each year, have a physical examination, the actual cost of which shall be paid by the BOARD, up to a maximum of ____ Dollars ($_____________). Such examination may be excused by action of the BOARD. The results shall be reported to the BOARD, but their confidentiality shall be maintained.

16. MEDICAL EXAMINATION - At least once a year during the term of this Agreement, the SUPERINTENDENT shall obtain a comprehensive medical examination of which an amount not to exceed ____ Dollars ($_____________) shall be provided by the BOARD. A copy of the examination or a certificate of the physician certifying the physical competency of the SUPERINTENDENT to perform his essential job functions shall be given to the President of the BOARD. The physician performing the medical examination shall be one licensed to practice medicine in all of its branches and shall be chosen by the SUPERINTENDENT.

COMMENT:

This language has been carefully crafted to avoid *Americans With Disabilities Act* ("ADA") problems.

19. MEMBERSHIP DUES:

17. MEMBERSHIP DUES - The SUPERINTENDENT, upon proper substantiation, shall be reimbursed for all dues and membership fees for those organizations to which he belongs with prior BOARD approval.

COMMENT:

This provision is standard, and protects the board by requiring board approval for the number of memberships paid on behalf of the superintendent. This would generally be a *de minimus* fringe benefit, not otherwise taxable to the superintendent, except if it is country club dues or the like.

20. WAIVER OF TENURE:

18. WAIVER OF TENURE - By accepting the terms of this Agreement, the SUPERINTENDENT waives all rights of tenure granted under the *School Code* during the term of this Agreement. (Strike if a one-year contract).

COMMENT:

This provision has been inserted for purposes of those states which allow the superintendent to gain tenure either as a teacher or as an administrator.

21. EXTENSION OF AGREEMENT--NON RENEWAL:

19. EXTENSION OF AGREEMENT--NON RENEWAL - This Agreement shall be reviewed by the BOARD and the SUPERINTENDENT annually on or before __________________ of each year, and may then be extended for a period of ___ (__) year(s) beyond its termination date, (one (1)

year, if a one-year contract) upon such terms and conditions as may be mutually agreed to by the parties, and reduced to writing and signed by the parties.

If the BOARD is reminded by the SUPERINTENDENT of the extension deadline date in this section and does not act on the extension or non-renewal by __________ in any given year, this Agreement will automatically be extended for one additional year.

Provided, however, notwithstanding anything contained in this Agreement to the contrary, this Agreement shall not be extended or rolled-over prior to its scheduled expiration date (as stated in Section 1 of this Agreement) unless all of the student performance and academic improvement goals contained in this Agreement have been met. (Strike if a one-year contract).

or

(A decision on this Agreement's extension or revision will be made at the first regular meeting of the BOARD in __________ of each year, or as soon thereafter as practicable. If the BOARD fails to act on this Agreement's extension or revision before __________ of any year, this Agreement will be automatically extended for one (1) additional year. Provided, however, notwithstanding anything contained in this Agreement to the contrary, this Agreement shall not be extended or rolled-over prior to its scheduled expiration date (as stated in Section 1 of this Agreement) unless all of the student performance and academic improvement goals contained in this Agreement have been met. (Strike if a one-year contract).)

COMMENT:

This is the fabled "evergreen" clause of an agreement. It leads to massive confusion, and frequent litigation given the changing membership of boards of education, and the consistency of the superintendent in office. It is problematic and often troublesome. An extensive discussion will ensue at the presentation of these materials concerning additional options board of education have in this area.

22. BOUNDARY CHANGE:

20. BOUNDARY CHANGE - Upon the implementation of any boundary change during the term of this Agreement which causes the School District to cease to exist as a separate entity due to detachment, consolidation, dissolution or any other method, the BOARD agrees to pay and the SUPERINTENDENT agrees to accept as liquidated damages, and not as a penalty or forfeiture, a monetary sum equal to the value of all compensation, as provided in Section 4, due and owing to the SUPERINTENDENT for the then remaining term of this Agreement. Provided, however, that said compensation to be paid as liquidated damages shall not exceed the sum of ____ Dollars ($___________). The BOARD shall also pay the SUPERINTENDENT the dollar value of all Teachers' Retirement System contributions, health insurance premiums, liability insurance premiums, life insurance premiums, unused and accumulated vacation days, unused and accumulated sick days, and any other benefits to which the SUPERINTENDENT would be entitled to under the remaining term of this Agreement.

Said sums shall be paid to the SUPERINTENDENT at the commencement of each year they are due under the terms of this Agreement and, prior to the implementation of any said boundary change, the BOARD shall deposit in trust for the SUPERINTENDENT a sum sufficient to fulfill its obligations hereunder. The dollar value of unused and accumulated vacation and sick days shall be determined by dividing the annual compensation provided in Section 4 by the number of days annually worked by the SUPERINTENDENT times the number of unused and accumulated vacation and sick days in each year remaining under the term of this Agreement. Upon receipt of such sums, the parties hereby agree to waive and release any and all claims, rights, causes of action, proceedings or privileges either may have against the other pursuant to this Agreement or any federal or state constitutional, statutory, or administrative provision.

COMMENT:

In essence, this provision is a "golden parachute" clause. It provides for the continuing protection if the school district merges, is acquired or is consolidated into other school districts or governmental areas.

23. NOTICE:

21. NOTICE - Any notice or communication permitted or required under this Agreement shall be in writing and shall become effective on the day of mailing thereof by first class mail, registered, or certified mail, postage prepaid, addressed:

If to the BOARD, to:

BOARD OF EDUCATION
School District No. _____

If to the SUPERINTENDENT, to:

(or at the last address of the SUPERINTENDENT contained in official Business Office records of the BOARD).

COMMENT:

This clause is relatively standard and seemingly innocuous. However, it is a detail often left blank at the time of execution of the agreement and is a detail which should not be overlooked.

24. BUSINESS EXPENSES:

22. BUSINESS EXPENSES - It is anticipated and agreed that the SUPERINTENDENT shall be required to incur certain personal expenses for the official business of the BOARD. As such, the BOARD agrees to reimburse the SUPERINTENDENT for any such expenses, incurred by him on behalf of the BOARD, subject, however, to the SUPERINTENDENT'S substantiation and the BOARD'S approval of such expenses.

COMMENT:

This is a provision which entitles the superintendent not to be required to pay tax on reimbursements for legitimate business expenses he/she receive from the board of education. The existence of this language in the agreement allows the superintendent to exclude from taxable income the business reimbursements, provided, of course, they are legitimate and verifiable.

25. OTHER BENEFITS AND LEAVE:

> **23. OTHER BENEFITS AND LEAVE - The SUPERINTENDENT shall be allowed such other privileges, leaves, and fringe benefits, including tuition reimbursement, not specifically enumerated as are extended to all other certificated personnel, except as otherwise set forth herein.**

COMMENT:

Often, central office staff receive fringe benefits that are not specifically enumerated in superintendents' agreements. This provision allows a safety net or a sweep, as it is, for all other benefits not specified in the agreement that are otherwise paid to other individuals. The school board should pay careful attention to the fact that if it has made specific arrangement with a specific administrator in the central office that is unique, this provision should be altered in the superintendent's agreement.

26. TEACHERS' RETIREMENT SYSTEM CONTRIBUTION:

> **24. TEACHERS' RETIREMENT SYSTEM CONTRIBUTION - In addition to the gross compensation paid to the SUPERINTENDENT by the BOARD as expressed in Section 4, the BOARD shall pick up and pay on the SUPERINTENDENT'S behalf, the SUPERINTENDENT'S entire contribution to the Illinois Teachers' Retirement System pursuant to the *Illinois Pension Code*.**
>
> **It is the intention of the parties to qualify all such payments picked up and paid by the BOARD on the SUPERINTENDENT'S behalf as employer**

payments pursuant to Section 414(h) of the *Internal Revenue Code of 1986*, as amended. The SUPERINTENDENT shall have no right or claim to the funds so remitted except as they may subsequently become available upon retirement or resignation from the Illinois Teachers' Retirement System. The SUPERINTENDENT does not have the option of choosing to receive the contributed amounts directly instead of having those contributions paid by the BOARD to the Illinois Teachers' Retirement System. These contributions are made as a condition of the SUPERINTENDENT'S employment for his future service, knowledge and experience.

25. TEACHERS' HEALTH INSURANCE SECURITY FUND CONTRIBUTION - The BOARD shall pick up and pay on behalf of the SUPERINTENDENT an amount of up to one-half (½) of one percent (1%) of the compensation stated in Section 4 (the "contribution limit") to the Teachers' Health Insurance Security ("THIS") fund. The BOARD shall remit this contribution to the Illinois Downstate Teachers' Retirement System ("TRS") as the fund's collection agent. The parties acknowledge and agree that the entire amount of the SUPERINTENDENT'S contribution is currently equal to one-half (½) of one percent (1%) of salary earned by him. The parties further expressly acknowledge and agree that the BOARD'S obligation under this section shall not exceed the contribution limit. If the amount of contribution exceeds the contribution limit, then the SUPERINTENDENT shall be solely responsible for the difference between his contribution and the contribution limit. If the amount of the SUPERINTENDENT'S contribution is below the contribution limit, then the BOARD'S obligation shall be limited to the actual contribution amount. Payments made by the BOARD to TRS under this section shall not be reportable to TRS as creditable earnings. The parties further agree that said payments shall be excluded from the SUPERINTENDENT'S taxable income pursuant to a private letter ruling issued to the IEA-NEA on April 8, 1996.

The BOARD and the SUPERINTENDENT make no commitment or guarantee that the BOARD'S payment of the contribution limit will continue to be excludable from the SUPERINTENDENT'S gross income for federal or state income tax purposes, or that any other federal or state tax treatment will apply.

Because neither party can represent what position the IRS, or any other government entity, will take with respect to these payments and withholdings, it is mutually agreed that each side will be responsible for any miscalculations for which it is legally responsible *without* indemnification or any other recourse from the other side. That is, if it is subsequently determined that the SUPERINTENDENT should have paid taxes on any portion of the contribution limit for which he did not pay taxes, the interest and penalties are the SUPERINTENDENT'S responsibility alone. If the BOARD is penalized for failing to withhold enough taxes based on the payroll information in its possession at the time of payment of the contribution limit, those penalties are the BOARD'S responsibility alone. Both the BOARD and the SUPERINTENDENT expressly waive the right to seek indemnification or

reimbursement from the other as the result of any government decision on the taxability of these amounts. In the event the IRS, or any other government entity, determines that the SUPERINTENDENT owes more taxes, he has *no* right to seek additional sums from the BOARD.

26. TEACHER'S RETIREMENT SYSTEM /2.2 UPGRADE CONTRIBUTION - In addition to the gross compensation paid to the Superintendent by the Board as expressed in Section 4, the Board shall pick up and pay on the Superintendent's behalf, the Superintendent's contributions for the upgrade required under Section 16-129.1 of the *Illinois Pension Code*. The foregoing payments shall be paid by the Board in lieu of same being paid by the Superintendent. The payments shall be made in equal installments over the life of this Agreement, but, in any event, over a period not to exceed five years.

It is the intention of the parties to qualify all such payments picked up and paid by the Board on the Superintendent's behalf as employer payments pursuant to Section 414(h) of the *Internal Revenue Code of 1986*, as amended. The Superintendent shall have no right or claim to the funds so remitted except as they may subsequently become available upon retirement or resignation from the Illinois Teachers' Retirement System. The Superintendent does not have the option of choosing to receive the contributed amounts directly instead of having those contributions paid by the Board to the Illinois Teachers' Retirement System. These contributions are made as a condition of the Superintendent's employment for her future service, knowledge and experience.

The Superintendent agrees that the Board's pickup and payment of the Superintendent's contributions for the upgrade required under Section 16-129.1 of the *Illinois Pension Code* is the sole early retirement benefit paid to the Superintendent by the Board. By accepting this benefit, the Superintendent expressly waives any and all early retirement initiatives otherwise available (or which may become available) to her, including, but not limited to, early retirement benefits available pursuant to any Board policy, practice or agreement, state law and the applicable rules and regulations of the Illinois Teachers' Retirement System. The Superintendent, in further consideration of the payments made on her behalf pursuant to this section, agrees that should she avail herself of any other early retirement benefits beyond those set forth in this section, she shall immediately become obligated to repay to the Board an amount equal to any payments made pursuant to this section on the Superintendent's behalf, not as a penalty, but solely as liquidated damages for her breach of this section.

COMMENT:

The three preceding contract provisions are unique to the State of Illinois, but are transferrable in other states with similar retirement and insurance provisions. The careful language to pay attention to is referenced in Section 414(h) of the *Internal Revenue Code*, so as to allow these amounts to be non-taxable to the superintendent when paid. The provisions of ERISA and the *Tax Reform Act of 1992* provide that these payments are eventually taxable to the superintendent upon withdrawal. The complicated provisions regarding the same will be developed orally in the presentations.

27. BACKGROUND INVESTIGATION:

> **27. BACKGROUND INVESTIGATION - The BOARD is prohibited from knowingly employing a person who has been convicted of committing or attempting to commit certain criminal offenses. If the required criminal background investigation is not completed at the time this contract is signed, and the subsequent investigation report reveals that there has been a prohibited conviction, this contract shall immediately become null and void.**

COMMENT:

In those states where a criminal background investigation is not required, this provision could be altered to make it generic. Boards of education should be permitted to do a background investigation of arrest and conviction on superintendent candidates so as to avoid potential embarrassment.

28. PROFESSIONAL LIABILITY:

28. PROFESSIONAL LIABILITY - The District agrees that it shall defend, hold harmless, and indemnify the SUPERINTENDENT from any and all demands, claims, suits, actions and legal proceedings brought against the SUPERINTENDENT in his individual capacity, or in his official capacity as agent and employee of the District provided the incident arose while the SUPERINTENDENT was acting within the scope of his employment and excluding criminal litigation and such liability coverage as is beyond the authority of the BOARD to provide under state law. Except that, in no case, will individual BOARD members be considered personally liable for indemnifying the SUPERINTENDENT against such demands, claims, suits, actions and legal proceedings.

COMMENT:

This provision merely provides protection for the superintendent in the event he is named, as he often is, in law suits contesting the validity or constitutionality of certain actions taken by the board.

29. SEVERANCE PAY:

29. SEVERANCE PAY - Should the SUPERINTENDENT resign his employment during the first year of this Agreement, the BOARD shall pay the SUPERINTENDENT the sum of ____________________ ($____________) as and for severance pay. Should the SUPERINTENDENT not resign his employment during the first year of this Agreement, no severance pay shall be paid nor shall the SUPERINTENDENT be entitled to any such payment.

30. SEVERANCE PAY - In the event the SUPERINTENDENT'S employment is terminated for any reason whatsoever, including, voluntarily, involuntarily, due to death or disability or with or without cause, the BOARD agrees to pay the SUPERINTENDENT, as severance pay, an amount equal to one-twelfth (1/12) of his current total compensation multiplied by the number of years of service beginning with the ______________ school year.

Severance pay shall be paid to the SUPERINTENDENT in a single lump sum or, with the consent of the SUPERINTENDENT, on such terms as may be agreed to by the BOARD and the SUPERINTENDENT. The SUPERINTENDENT shall receive a pro-rated amount of severance pay for any partial period of an annual term which is served as the SUPERINTENDENT.

31. LIQUIDATED DAMAGES - The SUPERINTENDENT in further consideration of the compensation, salary and fringe benefits paid by the BOARD as stated in this Agreement, agrees to devote his entire time, attention and energies to the performance of his duties under this Agreement; not to seek and/or obtain employment with any other person or entity for the entire term of this Agreement without the prior written consent of the BOARD; and, not to resign or otherwise voluntarily terminate his employment with the BOARD prior to the expiration of this Agreement. In the event that the SUPERINTENDENT breaches any of the terms or provisions of this section, then he shall immediately become obligated to repay to the BOARD an amount equal to 10% of the total sum then payable to him under Section 4 of this Agreement whether previously paid or payable, not as a penalty, but solely as liquidated damages for the SUPERINTENDENT'S breach of this section.

COMMENT:

Various of these provisions attempt to provide for the orderly transition in the event the board wishes to sever its relationship with the superintendent. Furthermore, in the third clause pertaining to liquidated damages, should the superintendent seek to be upwardly mobile, the liquidated damages is an attempt to reimburse the board of education for the costs of a superintendent search.

At the presentation of these materials at the advocacy session, the use of a true golden parachute clause will be discussed as will attempts to lessen the effect of an acrimonious dispute between the board of education and the superintendent which leads to public acrimony and debate, if not litigation.

30. NOTICE OF NON-RENEWAL:

32. NOTICE OF NON-RENEWAL - Should either the BOARD or SUPERINTENDENT decide not to renew this Agreement at its conclusion, notice of such determination of non-renewal shall be given in writing to the SUPERINTENDENT or the BOARD, as the case may be, no later than __________________, _____. Failure to so provide notice of non-renewal shall automatically renew this Agreement for one year under the same terms and conditions of employment in effect at the time. Provided, however, notwithstanding anything contained in this Agreement to the contrary, this Agreement shall not be extended or rolled-over prior to its scheduled expiration date (as stated in Section 1 of this Agreement) unless all of the student performance and academic improvement goals contained in this Agreement have been met. (Strike if a one-year contract).

COMMENT:

This clause is similar to the "evergreen clause" discussed above.

31. LIVING IN DISTRICT:

33. LIVING IN DISTRICT - While not a condition of this Agreement or a requirement of the BOARD, the SUPERINTENDENT has agreed to establish his residence within the boundaries of the School District and, therefore, the BOARD and the SUPERINTENDENT have negotiated and agreed to the compensation and benefits to be paid to the SUPERINTENDENT under this Agreement in reliance on the SUPERINTENDENT'S agreement.

COMMENT:

This provision may be amended to provide for moving expenses, relocation expenses, a one-time payment to the superintendent, or reimbursement of points or parts of the service costs of a mortgage loan for the superintendent for establishing residence in the district. In some states, residence of the superintendent in the district may be a condition of employment; in other states it is prohibited; in other states requirements of the like have been ruled unconstitutional.

BEST COPY AVAILABLE

32. EARLY RETIREMENT:

34. EARLY RETIREMENT - In the event the SUPERINTENDENT qualifies for "early retirement" pursuant to the terms of the applicable rules and regulations of the Illinois Teachers' Retirement System ("TRS") during the term of this Agreement and the SUPERINTENDENT elects to take early retirement, the BOARD shall pay the SUPERINTENDENT'S "employee contribution" for TRS early retirement purposes. Such payment shall be deemed an employer contribution made on the SUPERINTENDENT'S behalf as employer payments pursuant to Section 414(h) of the *Internal Revenue Code* of 1986, as amended. The SUPERINTENDENT shall have no right or claim to the funds so remitted except as they may subsequently become available upon retirement or resignation from the Illinois Teachers' Retirement System. The SUPERINTENDENT does not have the option of choosing to receive the contributed amounts directly instead of having those contributions paid by the BOARD to the Illinois Teachers' Retirement System. These contributions are made as a condition of the SUPERINTENDENT'S employment for his future service, knowledge and experience.

35. SPECIAL PAYMENT IN FINAL YEAR - After the SUPERINTENDENT has announced his intention to retire from service he will receive a special payment equal to one-twelfth (1/12) of his then annual salary, as severance pay.

COMMENT:

These provisions are unique to Illinois, and provide a retirement incentive agreement for superintendents.

33. OUT OF STATE RETIREMENT BENEFITS:

36. OUT OF STATE RETIREMENT BENEFITS - The parties acknowledge and agree that the SUPERINTENDENT has been a participant in the State of Illinois Teachers' Retirement System, and that the SUPERINTENDENT may purchase additional credits within the Illinois Teachers' Retirement System ("TRS") equal to an amount allowed by law for his out-of-state credit. The BOARD, therefore, agrees to pay to TRS, on the SUPERINTENDENT'S behalf, the sum of $_______________ per year, for

the purchase of this out-of-state credit. When these payments satisfy the total amounts due to TRS for this out-of-state credit, the payments to the System shall be discontinued, and an equivalent amount shall be otherwise distributed as elected by the SUPERINTENDENT. Such election shall be made for any year prior to the first day thereof, and shall be irrevocable for such year.

COMMENT:

Most states allow reciprocal transfer of retirement credits pursuit to certain formulae, and given the highly mobile nature of superintendent transference, this is a rapidly expanding benefit. Under certain circumstances the payment of out-of-state retirement credits, which are reciprocal, can either be taxable to the superintendent or non-taxable depending upon the intricacies of a plan adopted by the board of education.

34. MISCELLANEOUS:

37. MISCELLANEOUS

A. This Agreement has been executed in Illinois, and shall be governed in accordance with the laws of the State of Illinois in every respect.

B. Section headings and numbers have been inserted for convenience of reference only, and if there shall be any conflict between such headings or numbers and the text of this Agreement, the text shall control.

C. This Agreement may be executed in one or more counterparts, each of which shall be considered an original, and all of which taken together shall be considered one and the same instrument.

D. This Agreement contains all the terms agreed upon by the parties with respect to the subject matter of this Agreement and supersedes all prior agreements, arrangements, and communications between the parties concerning such subject matter, whether oral or written.

E. **This Agreement shall be binding upon and inure to the benefit of the SUPERINTENDENT, his successors, assigns, heirs, executors, and personal representatives, and shall be binding upon, and inure to the benefit of the BOARD, its successors and assigns.**

F. **Both parties have had the opportunity to seek the advice of counsel. The BOARD has relied upon the advice and representation of counsel selected by its respecting the legal liabilities of the parties, if any. The SUPERINTENDENT has voluntarily decided to act without the advice of counsel, without threat or coercion.**

G. **Except as may otherwise be provided, no subsequent alteration, amendment, change, or addition to this Agreement shall be binding upon the parties unless reduced to writing and duly authorized and signed by each of them.**

H. **The BOARD retains the right to repeal, change or modify any policies or regulations which it has adopted or may hereafter adopt, subject however, to restrictions contained in the *Illinois School Code* and other applicable law.**

I. **If any section, provision, paragraph, phrase, clause or word contained herein is held to be void, invalid or contrary to law by a court of competent jurisdiction, it shall be deemed removed herefrom, and the remainder of this Agreement shall continue to have its intended full force and effect.**

COMMENT:

These provisions are standard contract provisions which should be in all superintendent agreements.

35. EXECUTION CLAUSE:

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in their respective names and in the case of the BOARD, by its President and Secretary on the day and year first above written.

SUPERINTENDENT:______________________________________

BOARD OF EDUCATION, SCHOOL
DISTRICT NO. ____,
____________ COUNTY, ILLINOIS

By:______________________________________
President

ATTEST:

____
Secretary

COMMENT:

This is standard for contracts.

V. INCENTIVE AGREEMENTS - RABBI TRUST, GOLDEN HANDCUFF CLAUSE, GOLDEN HANDCUFF AGREEMENTS

[Date]

______________, Superintendent
School District USA
School Street
City, State ZIP

RE: MODEL SUPERINTENDENT'S COMPENSATION AGREEMENTS

Dear _______________:

The Board of Education asked that I contact you. Sent with this letter are the following materials:

A. Sample employment agreement language establishing a "golden handcuff"-type arrangement.

B. Sample copies of a non-qualified incentive plan and accompanying trust.

C. Sample copies of a non-qualified deferred compensation incentive plan agreement and accompanying trust.

The materials are provided to you in our capacity as attorneys for the Board of Education, who I understand have authorized our direct contact with you.

The golden handcuff arrangement is intended to provide an automatic salary increase to a superintendent who enjoys a solid relationship with the board of education. It operates by having the superintendent give notice of a potential retirement; upon giving of the notice, his salary is increased by a certain percentage (here 120% of the previous year's salary), with the proviso that the superintendent is not bound to retire during the term of his agreement. In effect, the paragraph allows the superintendent to give notice of potential retirement by a designated date in the first year of his agreement; receive the salary increase; and continue employment through the end of the employment agreement.

The two sets of trust documents are variations of a non-qualified Rabbi trust-style deferred compensation plan. The first version reflects a relatively straightforward contribution scheme by the Board of Education. The second represents a more sophisticated contribution scheme.

Some background information may be useful to you in your review of these documents. Rabbi trusts are a form of deferred compensation agreement that has been approved by the Internal Revenue Service. As a tax deferred vehicle, amounts contributed to the Rabbi trust will not be included in the beneficiary/employee's taxable income until they are actually distributed. Until actually distributed, the trust contributions are considered assets of the employer, and are subject to the employer's general creditors.

Because it is a nonqualified deferred compensation vehicle, it is not treated like a tax-sheltered annuity or a Section 457 deferred compensation plan. Amounts contributed to a Rabi trust are generally not considered "creditable earnings" for Teachers Retirement System purposes.

The Rabbi trust is a generally straight-forward deferred compensation arrangement. The trust and plan are established between the beneficiary's employer, who is classified as the grantor and an eligible bank or similar institution as trustee. An "eligible bank" is one which has been given corporate trustee powers by the State of Illinois. The employee(s) for whom the trust is established is considered the trust's beneficiary. The employer may then contribute amounts to the trust, without limitation. The trustee is obligated to manage amounts contributed to the trust for the beneficiary's sole benefit. Amounts contributed to the trust are considered tax deferred compensation.

An important aspect of this arrangement is its creditable earnings status under the *Illinois Pension Code*. Amounts contributed to a Rabbi trust are not generally considered creditable earnings. You may not generally use amounts contributed to this arrangement in a determination of your final average salary for annuity calculation purposes. The distribution scheme of the second trust and plan is a device used by some districts to attempt to convert portions of these contributions to creditable and taxable earnings. If maximization of TRS creditable earnings is a primary goal of yours, these trusts are usually not attractive alternatives. If, however, your goal is to maximize income on a tax deferred basis with relatively little concern for the trust's impact on TRS creditable earnings, then it may be an attractive investment option for your retirement planning.

Either or both of these arrangements must make use of the accompanying trust document in order to comply with the most recent IRS regulations on non-qualified deferred compensation trusts. Either or both of these trust arrangements may be modified slightly for conversion into a so-called "secular trust", which would allow the trust contributions to be immediately vested and credited to the superintendent; note, however, that conversion to the secular trust also would require immediate recognition by the superintendent of the trust contributions as taxable income.

Retirement - If the Superintendent gives the Board written notice of his intent to retire as Superintendent of ______________________________ School District __________ before July 1 of the last year that the Superintendent intends to act as Superintendent of Schools, the Board shall increase the Superintendent's gross compensation as described below. The Board shall pay the Superintendent an annual amount equal to that amount necessary to increase the Superintendent's creditable earnings for TRS purposes to one hundred and twenty percent (120%) of the prior year's creditable earnings for each fiscal year remaining prior to the effective date of said retirement. By executing this Agreement, the Board hereby accepts said retirement at the time notice is given by the Superintendent. This provision in no way obligates the Superintendent to retire at any time during the term of this Employment Agreement. Any amounts due and payable to the Superintendent pursuant to this provision shall be paid by the Board as directed by the Superintendent. Any amount due and payable to the Superintendent pursuant to this provision is also considered part of the gross compensation paid to the Superintendent and any TRS contribution that is required shall be picked up and paid on the Superintendent's behalf by the Board in accordance with Paragraph ___ of this Agreement.

TRUST UNDER THE ____________________
NONQUALIFIED INCENTIVE PLAN

(a) This Agreement made this _____ day of _______________, 200__, effective _____________, 200__, by and between Board of Education, School District No. ____, ________ County, ____________ (District) and ____________________ (Trustee);

(b) WHEREAS, District has adopted the Nonqualified Incentive Plan(s) as listed in Appendix A.

(c) WHEREAS, District has incurred or expects to incur liability under the terms of such Plan(s) with respect to the individual(s) participating in such Plan(s);

(d) WHEREAS, District wishes to establish a trust (hereinafter called "Trust"), and to contribute to the Trust assets that shall be held therein, subject to the claims of District's creditors in the event of District's insolvency, as herein defined, until paid to Plan participant(s) and their beneficiaries in such manner and at such times as specified in the Plan(s);

(e) WHEREAS, it is the intention of the parties that this Trust shall constitute an unfunded arrangement and shall not affect the status of the Plan(s) as an unfunded plan maintained for the purpose of providing deferred compensation for a select person or group of management or highly compensated employees for purposes of Title I of the Employee Retirement Income Security Act of 1974, to the extent that same may be applicable to District;

(f) WHEREAS, it is the intention of District to make contributions to the Trust to provide itself with a source of funds to assist it in the meeting of its liabilities under the Plan(s);

NOW, THEREFORE, the parties do hereby establish the Trust and agree that the Trust shall be comprised, held and disposed of as follows:

Section 1. Establishment Of Trust

(a) District hereby deposits with Trustee in trust the amount(s) listed in the Plan(s) attached hereto as Appendix A (which Plan(s) are incorporated herein by reference), which shall become the principal of the Trust to be held, administered and disposed of by Trustee as provided in this Trust Agreement.

(b) The Trust hereby established shall be irrevocable.

(c) The Trust is intended to be a grantor trust, of which District is the grantor, within the meaning of subpart E, part I, subchapter J, chapter 1, subtitle A of the *Internal Revenue Code of 1986*, as amended, and shall be construed accordingly.

(d) The principal of the Trust, and any earnings thereon shall be held separate and apart from other funds of District and shall be used exclusively for the uses and purposes of Plan participants and general creditors as herein set forth. Plan participants and their beneficiaries shall have no preferred claim on, or any beneficial ownership interest in, any assets of the Trust. Any rights created under the Plan(s) and this Trust Agreement shall be mere unsecured contractual rights of Plan participants and their beneficiaries against District. Any assets held by the Trust will be subject to the claims of District's general creditors under federal and state law in the event of insolvency, as defined in Section 3(a) herein.

(e) District, in its sole discretion, may at any time, or from time to time, make additional deposits of cash or other property in trust with Trustee to augment the principal to be held, administered and disposed of by Trustee as provided in this Trust Agreement. Neither Trustee nor any Plan participant or beneficiary shall have any right to compel such additional deposits.

Section 2. Payments to Plan Participants and Their Beneficiaries

(a) District shall deliver to Trustee the schedule set forth in Appendix A (the "Payment Schedule") that indicates the amounts payable in respect of each Plan participant (and beneficiaries), that provides a formula or other instructions acceptable to Trustee for determining the amounts so payable, the form in which such amount is to be paid (as provided for or available under the Plan(s)), and the time of commencement for payment of such amounts. Except as otherwise provided herein, Trustee shall make payments to the Plan participants and their beneficiaries in accordance with such Payment Schedule. The Trustee shall make provision for the reporting and withholding of any federal, state or local taxes that may be required to be withheld with respect to the payment of benefits pursuant to the terms of the Plan(s) and shall pay amounts withheld to the appropriate taxing authorities or determine that such amounts have been reported, withheld and paid by District.

(b) The entitlement of a Plan participant or his or her beneficiaries to benefits under the Plan(s) shall be determined by District or such party as it shall designate under the Plan(s), and any claim for such benefits shall be considered and reviewed under the procedures set out in the Plan(s).

(c) District may make payment of benefits directly to Plan participants or their beneficiaries as they become due under the terms of the Plan(s). District shall notify Trustee of its decision to make payment of benefits directly prior to the time amounts are payable to participants or their beneficiaries. In addition, if the principal of the Trust, and any earnings thereon, are not sufficient to make payments of benefits in accordance with the terms of the Plan(s), District shall make the balance of each such payment as it falls due. Trustee shall notify District where principal and earnings are not sufficient.

Section 3. Trustee Responsibility Regarding Payments to Trust Beneficiary When District Is Insolvent

(a) Trustee shall cease payment of benefits to Plan participants and their beneficiaries if the District is Insolvent. District shall be considered "Insolvent" for purposes of this Trust Agreement if (i) District is unable to pay its debts as they become due, (ii) District is subject to a pending proceeding as a debtor under the United States Bankruptcy Code, or (iii) District is determined to be insolvent by the Illinois State Board of Education or United States Department of Education.

(b) At all times during the continuance of this Trust, as provided in Section (d) hereof, the principal and income of the Trust shall be subject to claims of general creditors of District under federal and state law as set forth below.

(1) The Board of Education and the Superintendent of District shall have the duty to inform Trustee in writing of District's insolvency. If a person claiming to be a creditor of District alleges in writing to Trustee that District has become Insolvent, Trustee shall determine whether District is Insolvent and, pending such determination, Trustee shall discontinue payment of benefits to Plan participants or their beneficiaries.

(2) Unless Trustee has actual knowledge of District's insolvency, or has received notice from District or a person claiming to be a creditor alleging that District is Insolvent, Trustee shall have no duty to inquire whether District is Insolvent. Trustee may in all events rely on such evidence concerning District's solvency as may be furnished to Trustee and that provides Trustee with a reasonable basis for making a determination concerning District's solvency.

(3) If at any time Trustee has determined that District is Insolvent, Trustee shall discontinue payments to Plan participants or their beneficiaries and shall hold the assets of the Trust for the benefit of District's general creditors. Nothing in this Trust Agreement shall in any way diminish any rights of Plan participants or their beneficiaries to pursue their rights as general creditors of District with respect to benefits due under the Plan(s) or otherwise.

(4) Trustee shall resume the payment of benefits to Plan participants or their beneficiaries in accordance with Section 2 of this Trust Agreement only after Trustee has determined that District is not Insolvent (or is no longer Insolvent).

(c) Provided that there are sufficient assets, if Trustee discontinues the payment of benefits from the Trust pursuant to Section 3(b) hereof and subsequently resumes such payments, the first payment following such discontinuance shall include the aggregate amount of all payments due to Plan participants or their beneficiaries under the terms of the Plan(s) for the period of such discontinuance, less the aggregate amount of any payments made to Plan participants or their beneficiaries by District in lieu of the payments provided for hereunder during any such period of discontinuance.

Section 4. Payments to District

Except as provided in Section 3 hereof, after the Trust has become irrevocable, District shall have no right or power to direct Trustee to return to District or to divert to others any of the Trust assets before all payment of benefits have been made to Plan participants and their beneficiaries pursuant to the terms of the Plan(s).

Section 5. Investment Authority

In no event may Trustee invest in securities (including stock or rights to acquire stock) or obligations issued by District, other than a *de minimus* amount held in common investment vehicles in which Trustee invests. All rights associated with assets of the Trust shall be exercised by Trustee or the person designated by Trustee, and shall in no event be exercisable by or rest with Plan participants. District shall have the right, at any time, and from time to time in its sole discretion, to substitute assets of equal fair market value for any asset held by the Trust.

Section 6. Disposition of Income

During the term of this Trust, all income received by the Trust, net of expenses and taxes, shall be accumulated and reinvested.

Section 7. Accounting by Trustee

Trustee shall keep accurate and detailed records of all investments, receipts, disbursements, and all other transactions required to be made, including such specific records as shall be agreed upon in writing between District and Trustee. All accounts, books and records shall be open at all reasonable times to inspection and audit by such person or persons as District may designate. Within sixty (60) days following the close of each calendar year and within sixty (60) days after the removal or resignation of Trustee, Trustee shall deliver to District a written account of its administration of the Trust during such year or during the period from the close of the last preceding year to the date of such removal or resignation, setting forth all investments, receipts, disbursements and other transactions effected by it, including a description of all securities and investments purchased and sold with the cost or net proceeds of such purchases or sales (accrued interest paid or receivable being shown separately), and showing all cash, securities and other property held in the Trust at the end of such year or as of the date of such removal or resignation as the case may be.

Section 8. Responsibility of Trustee

(a) Trustee shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, provided, however, that Trustee shall incur no liability to any person for any action taken pursuant to a direction, request, or approval given by District which is contemplated by, and in conformity with, the terms of the Plan(s) or this Trust and is given in writing by District. In the event of a dispute between District and a party, Trustee may apply to a court of competent jurisdiction to resolve the dispute.

(b) If Trustee undertakes or defends any litigation arising in connection with this Trust, District agrees to indemnify Trustee against Trustee's costs, expenses and liabilities (including, without limitation, attorneys' fees and expenses) relating thereto and to be primarily liable for such payments. If District does not pay such costs, expenses and liabilities in a reasonably timely manner, Trustee may obtain payment from the Trust.

(c) Trustee may consult with legal counsel (who may also be counsel for District generally) with respect to any of its duties or obligations hereunder.

(d) Trustee may hire agents, accountants, actuaries, investment advisors, financial consultants or other professionals to assist it in performing any of its duties or obligations hereunder.

(e) Trustee shall have, without exclusion, all powers conferred on Trustees by applicable law, unless expressly provided otherwise herein, provided, however, that if an insurance policy is held as an asset of the Trust, Trustee shall have no power to name a beneficiary of the policy other than the Trust, to assign the policy (as distinct from conversion of the policy to a different form) other than to a successor Trustee, or to loan to any person the proceeds of any borrowing against such policy. Provided, however, Trustee is prohibited from acting in any way that would be legally prohibited if undertaken by District.

(f) However, notwithstanding the provisions of Section 8(e) above, Trustee may loan to District the proceeds of any borrowing against an insurance policy held as an asset of the Trust.

(g) Notwithstanding any powers granted to Trustee pursuant to this Trust Agreement or to applicable law, Trustee shall not have any power that could give this Trust the objective of carrying on a business and dividing the gains therefrom, within the meaning of section 301.7701-2 of the Procedure and Administrative Regulations promulgated pursuant to the Internal Revenue Code.

Section 9. Compensation and Expenses of Trustee

District shall pay all administrative and Trustee's fees and expenses. If not so paid, the fees and expenses shall be paid from the Trust.

Section 10. Resignation or Removal of Trustee

(a) Trustee may resign at any time by written notice to District, which shall be effective thirty (30) days after receipt of such notice unless District and Trustee agree otherwise.

(b) Trustee may be removed by District on thirty (30) days notice or upon shorter notice accepted by Trustee.

(c) Upon a Change of Control, as defined herein, Trustee may not be removed except pursuant to the terms of this Trust.

(d) Upon resignation or removal of Trustee and appointment of a successor Trustee, all assets shall subsequently be transferred to the successor Trustee. The transfer shall be completed within sixty (60) days after receipt of notice of resignation, removal or transfer, unless District extends the time limit.

(e) If Trustee resigns or is removed, a successor shall be appointed, in accordance with Section 11 hereof, by the effective date of resignation or removal under paragraphs (a) or (b) of this section. If no such appointment has been made, Trustee may apply to a court of competent jurisdiction for appointment of a successor or for instructions. All expenses of Trustee in connection with the proceeding shall be allowed as administrative expenses of the Trust.

Section 11. Appointment of Successor

(a) If Trustee resigns or is removed in accordance with Section 10(a) or (b) hereof, District may appoint any third party, such as a bank trust department or other party that may be granted corporate trustee powers as a successor. Said appointment shall be effective when accepted in writing by the new Trustee, who shall have all of the rights and powers of the former Trustee, including ownership rights in the Trust assets. The former Trustee shall execute any instrument necessary or reasonably requested by District or the successor Trustee to evidence the transfer.

(b) The successor Trustee need not examine the records and acts of any prior Trustee and may retain or dispose of existing Trust assets, subject to Sections 7 and 8 hereof. The successor Trustee shall not be responsible for and District shall indemnify, and defend the successor Trustee from any claim or liability resulting from any action or inaction of any prior Trustee or from any other past event or any condition existing at the time it becomes successor Trustee.

Section 12. Amendment or Termination

(a) This Trust Agreement may be amended by a written instrument executed by Trustee and District. Notwithstanding the foregoing, no such amendment shall conflict with the terms of the Plan(s) or shall make the Trust revocable after it has become irrevocable in accordance with Section (b) hereof.

(b) The Trust shall not terminate until the date on which Plan participants and their beneficiaries are no longer entitled to benefits pursuant to the terms of the Plan(s). Upon termination of the Trust, any assets remaining in the Trust shall be returned to District.

Section 13. Miscellaneous

(a) Any provision of this Trust Agreement prohibited by law shall be ineffective to the extent of any such prohibition, without invalidating the remaining provisions hereof.

(b) Benefits payable to Plan participants and their beneficiaries under this Trust Agreement may not be anticipated, assigned (either at law or in equity), alienated, pledged, encumbered or subjected to attachment, garnishment levy, execution or other legal or equitable process.

(c) This Trust Agreement shall be governed by and construed in accordance with the laws of Illinois.

(d) For purposes of this Trust, Change of Control shall mean: the consolidation, reconfiguration, dissolution, reclassification or redesignation of the District with or into any other school district.

(e) Upon a change of control as defined herein, the successor school district resulting therefrom shall, as a condition of such change in control, assume the obligations of, and shall be substituted for, the Grantor hereunder.

Section 14. Effective Date

The effective date of this Trust Agreement shall be ________________, _______.

BOARD OF EDUCATION OF
SCHOOL DISTRICT NO. ____,
______ COUNTY, ______________

By: ___________________________________
Its President

ATTEST:

____
Secretary

TRUSTEE

By: ______________________________

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NONQUALIFIED INCENTIVE PLAN AGREEMENT

This Nonqualified Incentive Plan Agreement made this ________ day of ____________, 200__, effective ________________, 200__, by the BOARD OF EDUCATION OF SCHOOL DISTRICT NO. ______, __________ COUNTY, ____________ (hereinafter called the "District"), for the benefit of __________________ (hereinafter called the "Superintendent"), an individual.

WITNESSETH:

WHEREAS, the District desires to establish a nonqualified incentive plan ("Plan") for the benefit of the Superintendent; and

WHEREAS, the District has agreed to make certain deferred payments for the benefit of the Superintendent in accordance with the terms and provisions of this Agreement and the Trust established thereunder (the terms of which are incorporated herein by reference).

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and for the purposes aforesaid, the parties hereto do hereby mutually declare and agree as follows:

SECTION 1.

GENERAL

1.1 The above recitals are incorporated into and made a part of this Agreement.

1.2 Pursuant to this Agreement, the District hereby creates and establishes the Plan on behalf of the Superintendent.

1.3 The Agreement shall be administered by the District to the extent provided for in this Agreement and the Trust and not otherwise prohibited by law. The Trustee appointed pursuant to the Trust Under the ________________________ Nonqualified Incentive Plan ("Trust") shall be responsible for the administration of the Agreement, to the extent provided for in this Agreement and the Trust.

SECTION 2.

DEFINITIONS

2.1 "Beneficiary" shall refer to the person designated in writing by the District to receive benefits under the Trust Agreement, or in the event of the designated beneficiary's death, then the Beneficiary's Surviving Spouse, followed by the Beneficiary's descendants per stirpes, and if none of the foregoing exist, the Beneficiary's estate.

2.2 "Contingent Benefits" shall mean the sum of deferred compensation held in the Trust which the Beneficiary will be entitled to upon completion of the terms specified in Schedule A, attached hereto.

2.3 "Deferred Compensation" shall mean the portion of the Superintendent's compensation for any fiscal year, or part thereof, that has been deferred pursuant to Schedule A, attached hereto.

2.4 "Fiduciary" shall mean a person who exercises any discretionary authority or discretionary control respecting the management of the Agreement or the Trust; or who exercises any authority or control respecting the management or disposition of the assets of the Trust Fund; or who renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of the Trust Fund or has any authority or responsibility to do so.

2.5 "Net Income" includes the increase (or decrease) after taxes in the fair market value of assets of the Trust, plus interest, dividends, and other income less expenses or payments on behalf of the Trust from the last day of the preceding quarter of the year.

2.6 "Principal" includes all contributions from the District in a quarter plus the aggregate of District contributions and net income from previous quarters, if any.

2.7 "Surviving Spouse" means a person who is married to the Superintendent at the date of his death and for at least one year prior thereto.

2.8 "Trust Fund" includes any and all assets held by a Trustee pursuant to the Trust.

2.9 "Vested Benefits" shall mean the nonforfeitable sum of deferred compensation held in the Trust which the Beneficiary is presently entitled to as provided in Schedule A attached hereto.

SECTION 3.

CONTRIBUTIONS TO THE TRUST FUND

The District shall, from time to time, make contributions to the Trust in accordance with Schedule A attached to this Agreement. The Trustee of the Trust shall be accountable to the District for all contributions received from the District, but the Trustee shall have no duty to see that the contributions received are sufficient to provide for benefits payable under the Agreement, nor shall the Trustee be obliged or have any right to enforce or collect any contribution from the District or otherwise see that the funds are deposited according to the provisions of the Agreement. All contributions so received, together with the income therefrom and any other increment thereon (hereinafter referred to as the "Trust Fund"), shall be held, managed and administered by the Trustee pursuant to the terms of both this Agreement and the Trust.

SECTION 4.

PAYMENTS FROM THE TRUST FUND

4.1 Payments of benefits under the Agreement shall be made from the Trust Fund, as set forth in Section 4.2, by the Trustee to the Superintendent or, in the event of his death, to his

Surviving Spouse, in such manner, at such time, and in such amounts, as specified in Section 6 below and/or Schedule A attached hereto. The Trustee shall be fully protected in making or discontinuing payments in accordance with this Agreement and the Trust and shall have no responsibility to see to the application of said payments or to ascertain whether such directions comply with the terms of the Agreement.

4.2 Within 30 days prior to the date the Superintendent or Surviving Spouse becomes entitled to receive a benefit under the Agreement, the District shall notify the Trustee in writing that such benefit is payable. Thereafter, the benefit payable to the Superintendent or Surviving Spouse shall be paid by the Trustee from the Trust Fund.

4.3 No interest of the Superintendent or of his Surviving Spouse in, or right to receive distribution from, assets held by the Trustee shall be subject in any manner to sale, transfer, assignment, pledge, attachment, garnishment or other alienation or encumbrances of any kind; nor may such interest or right to receive distributions be taken, either voluntarily or involuntarily, for the satisfaction of the debts of, or other obligations or claims against the Superintendent or Surviving Spouse, including claims in bankruptcy proceedings.

4.4 As of the end of each calendar quarter the Trustee shall determine the fair market value of the Trust Fund, after adding any deposits made to the Trust Fund and deducting distributions, taxes and any expenses of administration paid out of the Trust Fund. In determining the value of the Trust Fund, the Trustee shall use generally accepted methods as the Trustee, in its discretion, shall deem advisable. All net income earned on the principal of the Trust Fund during each calendar quarter shall become principal as of the end of each quarter.

4.5 Notwithstanding anything to the contrary contained herein, the assets of the Trust Fund shall constitute general unrestricted assets of the District and shall be subject to the claims of the creditors of the District.

SECTION 5.

IRREVOCABLE AGREEMENT

This Agreement and the Trust and beneficial interests, whether vested or contingent, hereby created shall be irrevocable and the District shall hereafter stand without power at any time to revoke or annul any of the provisions herein contained or any of the vested or contingent beneficial interests affected thereby, whether pursuant to a statute of the State of Illinois or a decision of its court, or otherwise. Provided, however, that the Agreement may be amended by a written instrument executed by the District, but only to the extent that such amendment does not conflict with the terms of the Trust or make this Agreement or the Trust revocable after it has become irrevocable.

SECTION 6.

TERMINATION OF PLAN

6.1 Upon the earlier happening of any one of the following events, the Trustee of the Trust shall make distributions of principal and income as hereinafter provided:

(a) The death of the Superintendent.

(b) The complete or total disability of the Superintendent for six (6) consecutive months or more.

(c) Pursuant to the terms of Schedule A attached hereto.

Disability shall mean the inability of the Superintendent to perform his usual duties for the District because of a mental or physical disability. If there is a dispute as to whether the Superintendent is disabled, then disability shall be determined by a panel of three medical doctors, one chosen by the Superintendent, one chosen by the District and one chosen by the two aforementioned medical doctors.

Upon the death of the Superintendent, the Trustee shall pay the Superintendent's Spouse, if living, one-third (1/3) of the then principal amount of the Trust. On the January 2nd next following the death of the Superintendent, the Trustee shall pay to the Superintendent's Spouse, if living, one-half (½) of the then principal of the Trust and on the second January 2nd following the

Superintendent's death, the Trustee shall pay to the Superintendent's Spouse, if living, the balance of the Trust. Until the Trust has been fully distributed to the Superintendent's Spouse, the Trustee shall pay to the Superintendent's Spouse all of the net income of the Trust in convenient installments, but at least quarterly.

In the event the Superintendent's Spouse should predecease the Superintendent or die before the full amount of the Trust has been distributed to her, then in any such event, the Trustee shall pay over the then Trust to the Superintendent's then living issue, in equal shares *per stirpes*, who were living at the time of the creation of this Plan and Trust.

Upon the occurrence of any disability described herein, the Trustee shall continue to pay the net income of the Trust to the Superintendent in convenient installments but at least quarterly and shall pay to the Superintendent, if living, one-third (1/3) of the then principal of the Trust. On the January 2nd next following any such event, the Trustee shall pay to the Superintendent, if living, one-half (½) of the then remaining principal of the Trust. On the second January 2nd following any such event, the Trustee shall pay to the Superintendent, if living, the balance of the Trust. In the event the Superintendent shall die before the aforesaid payments are payable, then the same shall be paid to the Superintendent's Spouse, if living, as and when due after the Superintendent's death. The Superintendent's Spouse, if living, shall be entitled to the net income of the Trust to be payable to her in convenient installments, but at least quarterly. In the event that the Superintendent's Spouse should predecease the Superintendent or die after the Superintendent but before the principal payments are completed, then upon the death of the last to die of the Superintendent and the Superintendent's Spouse ("Last Decedent") the Trustee shall distribute the then principal balance of the Trust to the Superintendent's then living issue, in equal shares *per stirpes*, who were living at the time of the creation of this Plan and Trust.

6.2 The Trust shall not terminate until the date on which the Superintendent or surviving Beneficiary is entitled to no more benefits.

6.3 Upon termination of the Trust Fund as provided in Section 6.2, any assets remaining in the Trust Fund shall be returned to the District.

SECTION 7.

EXCLUSIVE BENEFIT

Assets deposited into the Trust pursuant to this Agreement shall be held by the Trustee in accordance with the terms of both this Agreement and the Trust for the exclusive benefit of the Superintendent or Surviving Spouse, and for the benefit of the District's creditors and the Trust shall be applied to provide benefits under this Agreement in accordance with the terms thereof. At no time prior to the complete satisfaction of all obligations to the Superintendent and his Surviving Spouse under the terms of the Agreement shall any part of the Trust be used for or diverted to purposes other than for the exclusive benefit of the Superintendent and his Surviving Spouse. However, without regard to the foregoing, distributions may be made from the Trust pursuant to Section 4.5, upon the terms specified in the Trust.

SECTION 8.

CONSOLIDATION OF DISTRICT

In the event of the consolidation, reconfiguration, dissolution, reclassification or redesignation of the District with or into any other School District, the successor School District resulting therefrom shall assume the obligations of the District hereunder and shall be substituted for the District hereunder.

SECTION 9.

MISCELLANEOUS

9.1 To the extent not pre-empted by the *Internal Revenue Code of 1986* as amended, or *Employee Retirement Income Security Act*, the laws of the State of Illinois shall govern, control and determine all questions arising with respect to this Agreement and the validity, interpretation and performance of its provisions.

9.2 Where the context permits, words in the masculine gender shall include the feminine and neuter genders, the singular shall include the plural, and the plural shall include the singular.

9.3 The headings of Sections of this Agreement are for convenience of reference only and shall have no substantive effect on the provisions of this Agreement.

9.4 In the event any provision of this Agreement shall be held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining provisions of the Agreement, and the Agreement shall be construed and enforced as if such illegal or invalid provision had never been contained herein.

IN WITNESS WHEREOF, the District, Trustee and the Superintendent have caused these presents to be signed by their respective officers thereunto duly authorized, and have caused their respective corporate seals to be hereto affixed, the day and year first above written.

BOARD OF EDUCATION OF
SCHOOL DISTRICT NO. _____,
___________ COUNTY, ______________

BY: ________________________________
Its President

____
Superintendent

ATTEST:

____
Secretary

____

Read and Approved:

TRUSTEE

BY: ________________________________

SCHEDULE A

The Board of Education of ________________________ District No. _____, ________ County, ______________, ("Grantor") shall defer $____________ annually, beginning in the 200__-__ fiscal year, on behalf of ____________________ ("Superintendent"), for _______ (__) years, with the final payment to be made during the 200__-__ fiscal year, as long as he is employed as Superintendent of _______________ School District _____. One Hundred Percent (100%) of the Trust Fund shall be vested in the Superintendent on _______________, 200__, if and only if the Superintendent works up to and including that date. The above amounts are only payable to the Superintendent in accordance to the terms of Paragraphs 6.1 of the __________________________ Nonqualified Incentive Plan Agreement dated _____________, 200__, effective _______________, 200__. If the Grantor terminates the Superintendent's employment as Superintendent of Schools for any reason, except for cause, the Trust Fund shall nevertheless be payable according to the _______ (__) years of payments required herein, in full, to the Superintendent at the time of separation from service in accordance to the terms of Paragraph 6.1 of the _____________________ Nonqualified Incentive Plan Agreement dated ______________, 200__, effective ______________, 200__. If for any other reason, except as indicated in Paragraph 6.1 of the ______________________ Nonqualified Incentive Plan Agreement dated ___________, 200__, effective _________________, 200__, the Superintendent separates from service as Superintendent of Schools, the balance of the Trust Fund, subject to the above distribution percentage requirements, shall revert to the Grantor and the Superintendent shall not be entitled to any other benefit described herein.

____________ NONQUALIFIED DEFERRED COMPENSATION INCENTIVE PLAN AGREEMENT

This Nonqualified Deferred Compensation Incentive Plan Agreement made this ____ day of _______, 200_, by and between the BOARD OF EDUCATION OF ________ SCHOOL DISTRICT NO. ___, __________ COUNTY, ________ (hereinafter called the "District"), for the benefit of ________________ (hereinafter called the "Superintendent"), an individual.

WITNESSETH:

WHEREAS, the District desires to establish a nonqualified deferred compensation plan ("Plan") for the benefit of the Superintendent; and

WHEREAS, the District has agreed to make certain deferred payments for the benefit of the Superintendent in accordance with the terms and provisions of this Agreement and the Trust established thereunder (the terms of which are incorporated herein by reference).

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and for the purposes aforesaid, the parties hereto do hereby mutually declare and agree as follows:

SECTION 1.

GENERAL

1.1 The above recitals are incorporated into and made a part of this Agreement.

1.2 Pursuant to this Agreement, the District hereby creates and establishes the Plan on behalf of the Superintendent.

1.3 The Agreement shall be administered by the District as provided for in this Agreement and the Trust, and the Trustee appointed pursuant to the Trust Under the Richard Olson Nonqualified Deferred Compensation Incentive Plan ("Trust") shall not be responsible for the administration of the Agreement.

SECTION 2.

DEFINITIONS

2.1 "Beneficiary" shall refer to the person designated in writing by the District to receive benefits under the Trust Agreement, or in the event of the designated beneficiary's death, then the Surviving Spouse, followed by the Beneficiary's descendants per stirpes, and if none of the foregoing exist, the Beneficiary's estate.

2.2 "Contingent Benefits" shall mean the sum of deferred compensation held in the Trust which the Beneficiary will be entitled to upon completion of the terms specified in Schedule A attached hereto.

2.3 "Deferred Compensation" shall mean the portion of the Superintendent's compensation for any fiscal year, or part thereof, that has been deferred pursuant to Schedule A, attached hereto.

2.4 "Fiduciary" shall mean a person who exercises any discretionary authority or discretionary control respecting the management of the Agreement or the Trust; or who exercises any authority or control respecting the management or disposition of the assets of the Trust Fund; or who renders investment advice for a fee or other compensation, direct or indirect, with respect to any monies or other property of the Trust Fund or has any authority or responsibility to do so.

2.5 "Net Income" includes the increase (or decrease) after taxes in the fair market value of assets of the Trust, plus interest, dividends, and other income less expenses or payments on behalf of the Trust from the last day of the preceding quarter of the year.

2.6 "Principal" includes all contributions from the District in a quarter plus the aggregate of District contributions and net income from previous quarters, if any.

2.7 "Surviving Spouse" means a person who is married to the Superintendent at the date of his death and for at least one year prior thereto.

2.8 "Trust Fund" includes any and all assets held by a Trustee pursuant to the Trust.

2.9 "Vested Benefits" shall mean the nonforfeitable sum of deferred compensation held in trust which the Beneficiary is presently entitled to as provided in Schedule A attached hereto.

SECTION 3.

CONTRIBUTIONS TO THE TRUST FUND

3.1 The District shall, from time to time, make contributions to the Trust in accordance with Schedule A attached to this Agreement. The Trustee of the Trust shall be accountable to the District for all contributions received from the District, but the Trustee shall have no duty to see that the contributions received are sufficient to provide for benefits payable under the Agreement, nor shall the Trustee be obliged or have any right to enforce or collect any contribution from the District or otherwise see that the funds are deposited according to the provisions of the Agreement. All contributions so received, together with the income therefrom and any other increment thereon (hereinafter referred to as the "Trust Fund"), shall be held, managed and administered by the Trustee pursuant to the terms of both this Agreement and the Trust.

SECTION 4.

PAYMENTS FROM THE TRUST FUND

4.1 Payments of benefits under the Agreement shall be made from the Trust Fund, as set forth in Section 4.2, by the Trustee to the Superintendent or, in the event of his death, to his Surviving Spouse, in such manner, at such time, and in such amounts, as specified in Schedule A attached hereto. The Trustee shall be fully protected in making or discontinuing payments in accordance with Schedule A and shall have no responsibility to see to the application of said payments or to ascertain whether such directions comply with the terms of the Agreement.

4.2 Within 30 days prior to the date the Superintendent or Surviving Spouse becomes entitled to receive a benefit under the Agreement, the District shall notify the Trustee in writing that such benefit is payable. Thereafter, the benefit payable to the Superintendent or Surviving Spouse shall be paid by the Trustee from the Trust Fund.

4.3 No interest of the Superintendent or of his Surviving Spouse in, or right to receive distribution from, assets held by the Trustee shall be subject in any manner to sale, transfer, assignment, pledge, attachment, garnishment or other alienation or encumbrances of any kind; nor may such interest or right to receive distributions be taken, either voluntarily or involuntarily, for the satisfaction of the debts of, or other obligations or claims against the Superintendent or Surviving Spouse, including claims in bankruptcy proceedings.

4.4 As of the end of each calendar quarter the Trustee shall determine the fair market value of the Trust Fund, after adding any deposits made to the Trust Fund and deducting distributions, taxes and any expenses of administration paid out of the Trust Fund. In determining the value of the Trust Fund, the Trustee shall use generally accepted methods as the Trustee, in his discretion, shall deem advisable. All net income earned on the principal of the Trust Fund during each calendar quarter shall become principal as of the end of each quarter.

4.5 Notwithstanding anything to the contrary contained herein, the assets of the Trust Fund shall constitute general unrestricted assets of the District and shall be subject to the claims of the creditors of the District.

SECTION 5.

TRUST IRREVOCABLE

5.1 This Agreement and the Trust and beneficial interests, whether vested or contingent, hereby created shall be irrevocable and the District shall hereafter stand without power at any time to alter, amend, revoke, change or annul any of the provisions herein contained or any of the vested or contingent beneficial interests affected thereby, whether pursuant to a statute of the State of ________ or a decision of its court, or otherwise.

(a) This Trust Agreement may, however, be amended by a written instrument executed by Trustee, the District and the Superintendent or the Surviving Spouse entitled to a benefit under the Agreement. Notwithstanding the foregoing, no such amendment shall conflict with the terms of the Plan or shall make the Plan or Trust revocable after it has become irrevocable.

SECTION 6.

TERMINATION OF PLAN

6.1 Upon the earlier happening of any one of the following events, the Trustee of the Trust shall make distributions of principal and income as hereinafter provided:

(a) The death of the Superintendent.

(b) The complete or total disability of the Superintendent for six (6) consecutive months or more.

Disability shall mean the inability of the Superintendent to perform his usual duties for the District because of a mental or physical disability. If there is a dispute as to whether the Superintendent is disabled, then disability shall be determined by a panel of three medical doctors, one chosen by the Superintendent, one chosen by the District and one chosen by the two aforementioned medical doctors.

Upon the death of the Superintendent, the Trustee shall pay his Surviving Spouse, if living, one-third (1/3) of the then principal amount of the Trust. On the January 2nd next following the death of the Superintendent the Trustees shall pay to the Surviving Spouse, if living, one-half (½) of the then principal of the Trust and on the second January 2nd following the Superintendent's death, the Trustees shall pay to the Surviving Spouse, if living, the balance of the Trust. Until the Trust has been fully distributed to the Superintendent's wife, the Trustee shall pay to the Superintendent's wife, all of the net income of the Trust in convenient installments but at least quarterly.

In the event the Surviving Spouse should predecease the Superintendent or die before the full amount of the Trust has been distributed to her, then in any such event, the Trustees shall pay over the then Trust to the Superintendent's wife's estate, to be distributed in accordance to her direction.

Upon the occurrence of any of the other events herein specified in this Section, the Trustee shall continue to pay the net income of the Trust to the Superintendent in convenient installments but at least quarterly and shall pay to the Superintendent, if living, one-third (1/3) of the then principal of the Trust Estate. On the January 2nd next following any such event, the Trustee shall pay to the Superintendent, if living, one-half (½) of the then remaining principal of the Trust. On the second January 2nd following any such event, the Trustees shall pay to the Superintendent, if living, the balance of the Trust. In the event the Superintendent shall die before the aforesaid payments are payable, then the same shall be paid to the Superintendent's wife, if living, as and when due after the Superintendent's death. The Superintendent's wife, if living, shall be entitled to the net income of the Trust to be payable to her in convenient installments but at least quarterly. In the event that the Superintendent's wife should predecease the Superintendent or die after the Superintendent but before the principal payments are completed, then upon the Superintendent's death (the Superintendent's wife having predeceased the Superintendent) or upon the Superintendent's wife's death, as the case may be, the Trustees shall distribute the then principal balance of the Trust to the estate of the last to survive of the Superintendent or his wife, to distributed in accordance to the direction of the decedent.

6.2 The Trust shall not terminate until the date on which the Superintendent or surviving Trust Beneficiary is entitled to no more benefits.

6.3 Upon termination of the Trust Fund as provided in Section 6.2, any assets remaining in the Trust Fund shall be returned to the District.

SECTION 7.

EXCLUSIVE BENEFIT

7.1 Assets deposited into the Trust pursuant to this Agreement shall be held by the Trustee in accordance with the terms of both this Agreement and the Trust for the exclusive benefit of the Superintendent or Surviving Spouse, and for the benefit of the District's creditors and the Trust shall be applied to provide benefits under this Agreement in accordance with the terms thereof. At no time prior to the complete satisfaction of all obligations to the Superintendent and his Surviving Spouse under the terms of the Agreement shall any part of the Trust be used for or diverted to purposes other than for the exclusive benefit of the Superintendent and his Surviving Spouse. However, without regard to the foregoing, distributions may be made from the Trust pursuant to Section 4.5, upon the terms specified in the Trust.

SECTION 8.

CONSOLIDATION OF DISTRICT

8.1 In the event of the consolidation, reconfiguration, dissolution, reclassification or redesignation of the District with or into any other School District, the successor School District resulting from the consolidation shall, as a condition to the consummation of the consolidation, assume the obligations of the District hereunder and shall be substituted for the District hereunder.

SECTION 9.

MISCELLANEOUS

9.1 To the extent not pre-empted by the *Employee Retirement Income Security Act*, the laws of the State of ________ shall govern, control and determine all questions arising with respect to this Agreement and the validity, interpretation and performance of its provisions.

9.2 Where the context permits, words in the masculine gender shall include the feminine and neuter genders, the singular shall include the plural, and the plural shall include the singular.

9.3 The headings of Sections of this Agreement are for convenience of reference only and shall have no substantive effect on the provisions of this Agreement.

9.4 In the event any provision of this Agreement shall be held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining provisions of the Agreement, and the Agreement shall be construed and enforced as if such illegal or invalid provision had never been contained herein.

IN WITNESS WHEREOF, the District, Trustee and the Superintendent have caused these presents to be signed by their respective officers thereunto duly authorized, and have caused their respective corporate seals to be hereto affixed, the day and year first above written.

BOARD OF EDUCATION OF
_______ SCHOOL DISTRICT NO. ___,
_________ COUNTY, _______

By: ______________________________
Its President

SUPERINTENDENT

____

ATTEST:

____
Secretary

TRUSTEE

By: ______________________________

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SCHEDULE A

The Board of Education of _______ School District No. ___, __________ County, ________ ("District") shall pay to the Trust Under the _____________ Nonqualified Deferred Compensation Incentive Plan ("Trust") $_________ annually, beginning in the 200_-1200_ fiscal year, on behalf ________________ ("Superintendent"), for _ years, with the final payment to be made during the 200_-200_ fiscal year, as long as he is employed as Superintendent of ________ School District No. ___. Additionally, the District shall pay to the Trust $_____ in the 200_-_ fiscal year and $_____ in the 200_-_ fiscal year on behalf of the Superintendent. On _______, 200_, an amount equal to that amount necessary to increase the Superintendent's creditable earnings with the ________ Teachers' Retirement System ("TRS") by __ percent over the Superintendent's prior year's creditable earnings, shall vest in the Superintendent and shall be payable at the Superintendent's option, if and only if the Superintendent works up to and including that date. On _______, 200_, an amount equal to that amount necessary to increase the Superintendent's creditable earnings with TRS by __ percent over the Superintendent's prior year's creditable earnings, shall vest in the Superintendent and shall be payable at the Superintendent's option, if and only if the Superintendent works up to and including that date. On _______, 200_, an amount equal to that amount necessary to increase the Superintendent's creditable earnings with TRS by __ percent over the Superintendent's prior year's creditable earnings, shall vest in the Superintendent and shall be payable at the Superintendent's option, if and only if the Superintendent works up to and including that date. On _______, 200_, up to an amount equal to that amount necessary to increase the Superintendent's creditable earnings with TRS by __ percent over the Superintendent's prior year's creditable earnings, shall vest in the Superintendent and shall be payable at the Superintendent's option, if and only if the Superintendent works up to and including that date. If any remaining balance of the trust fund exist after _______, 200_, it shall vest in the Superintendent and shall be payable at the Superintendent's option on _________, 200_, if and only if the Superintendent works up to and including _______, 200_. The amount that vests in the Superintendent shall be determined annually by the Trustee, and the Trustee shall notify the District of said amount on or before _______ of each year in which any amount vests. The above amounts are only payable to the Superintendent in accordance to the terms of Paragraph 6.1 of the ____________ Nonqualified Deferred Compensation Incentive Plan Agreement dated __________, 200_ ("Plan"). If the District terminates the Superintendent's employment as Superintendent of Schools for any reason, except for cause, the Trust Fund shall nevertheless be payable according to the five (5) years of payments required herein, in full, to the Superintendent at the time of separation from service in accordance to the terms of Paragraph 6.1 of the Plan. If for any other reason, except as indicated in Paragraph 6.1 of the Plan, the Superintendent separates from service as Superintendent of Schools, the balance of the Trust Fund, subject to the above distribution percentage requirements, shall revert to the District and the Superintendent shall not be entitled to any other benefit described herein.

Any amounts paid to the Trust by the District or earned by the Trust as interest income shall not be payable and not vest until described above. As a result, those amounts shall not be taxable or creditable for TRS purposes until they are vested and payable. At the time that any amounts become vested and payable, the Board shall report these amounts as taxable and creditable in accordance with Board policy. The Superintendent shall be responsible for all employee required contributions to TRS as a result of these amounts vesting in him.

TRUST UNDER ____________ PLAN

OPTIONAL

(a) This Agreement made this ____ day of ____________ by and between ______________ (Company) and ____________________ (Trustee);

(b) WHEREAS, Company has adopted the nonqualified deferred compensation Plan(s) as listed in Appendix ______.

OPTIONAL

(c) WHEREAS, Company has incurred or expects to incur liability under the terms of such Plan(s) with respect to the individuals participating in such Plan(s);

(d) WHEREAS, Company wishes to establish a trust (hereinafter called "Trust"), and to contribute to the Trust assets that shall be held therein, subject to the claims of Company's creditors in the event of Company's Insolvency, as herein defined, until paid to Plan participants and their beneficiaries in such manner and at such times as specified in the Plan(s);

(e) WHEREAS, it is the intention of the parties that this Trust shall constitute an unfunded arrangement and shall not affect the status of the Plan(s) as an unfunded plan maintained for the purpose of providing deferred compensation for a select group of management or highly compensated employees for purposes of Title I of the Employee Retirement Income Security Act of 1974;

(f) WHEREAS, it is the intention of Company to make contributions to the Trust to provide itself with a source of funds to assist it in the meeting of its liabilities under the Plan(s);

NOW, THEREFORE, the parties do hereby establish the Trust and agree that the Trust shall be comprised, held and disposed of as follows:

Section 1. Establishment Of Trust

(a) Company hereby deposits with Trustee in trust (insert amount deposited), which shall become the principal of the Trust to be held, administered and disposed of by Trustee as provided in this Trust Agreement.

ALTERNATIVES - Select one provision.

(b) The Trust hereby established shall be revocable by Company.

(b) The Trust hereby established shall be irrevocable.

(b) The Trust hereby established is revocable by Company; it shall become irrevocable upon a Change of Control, as defined herein.

(b) The Trust shall become irrevocable ______ [insert number] days following the issuance of a favorable private letter ruling regarding the Trust from the Internal Revenue Service.

(b) The Trust shall become irrevocable upon approval by the Board of Directors.

(c) The Trust is intended to be a grantor trust, of which Company is the grantor, within the meaning of subpart E, part I, subchapter J, chapter 1, subtitle A of the Internal Revenue Code of 1986, as amended, and shall be construed accordingly.

(d) The principal of the Trust, and any earnings thereon shall be held separate and apart from other funds of Company and shall be used exclusively for the uses and purposes of Plan participants and general creditors as herein set forth. Plan participants and their beneficiaries shall have no preferred claim on, or any beneficial ownership interest in, any assets of the Trust. Any rights created under the Plan(s) and this Trust Agreement shall be mere unsecured contractual rights of Plan participants and their beneficiaries against Company. Any assets held by the Trust will be subject to the claims of Company's general creditors under federal and state law in the event of Insolvency, as defined in Section 3(a) herein.

ALTERNATIVES - Select one or more provisions.

(e) Company, in its sole discretion, may at any time, or from time to time, make additional deposits of cash or other property in trust with Trustee to augment the principal to be held, administered and disposed of by Trustee as provided in this Trust Agreement. Neither Trustee nor any Plan participant or beneficiary shall have any right to compel such additional deposits.

(e) Upon a Change of Control, Company shall, as soon as possible, but in no event longer than ______________________________ [fill in blank] days following the Change of Control, as defined herein, make an irrevocable contribution to the Trust in an amount that is sufficient to pay each Plan participant or beneficiary the benefits to which Plan participants or their beneficiaries would be entitled pursuant to the terms of the Plan(s) as of the date on which the Change of Control occurred.

(e) Within ______________________ [fill in blank] days following the end of the Plan year(s), ending after the Trust has become irrevocable pursuant to Section i(b) hereof, Company shall be required to irrevocably deposit additional cash or other property to the Trust in an amount sufficient to pay each Plan participant or beneficiary the benefits payable pursuant to the terms of the Plan(s) as of the close of the Plan year(s).

Section 2. Payments to Plan Participants and Their Beneficiaries

(a) Company shall deliver to Trustee a schedule (the "Payment Schedule") that indicates the amounts payable in respect of each Plan participant (and his or her beneficiaries), that provides a formula or other instructions acceptable to Trustee for determining the amounts so payable, the form in which such amount is to be paid (as provided for or available under the Plan(s)), and the time of commencement for payment of such amounts. Except as otherwise provided herein, Trustee shall make payments to the Plan participants and their beneficiaries in accordance with such Payment Schedule. The Trustee shall make provision for the reporting and withholding of any federal, state or local taxes that may be required to be withheld with respect to the payment of benefits pursuant to the terms of the Plan(s) and shall pay amounts withheld to the appropriate taxing authorities or determine that such amounts have been reported, withheld and paid by Company.

(b) The entitlement of a Plan participant or his or her beneficiaries to benefits under the Plan(s) shall be determined by Company or such party as it shall designate under the Plan(s), and any claim for such benefits shall be considered and reviewed under the procedures set out in the Plan(s).

(c) Company may make payment of benefits directly to Plan participants or their beneficiaries as they become due under the terms of the Plan(s), Company shall notify Trustee of its decision to make payment of benefits directly prior to the time amounts are payable to participants or their beneficiaries. In addition, if the principal of the Trust, and any earnings thereon, are not sufficient to make payments of benefits in accordance with the terms of the Plan(s), Company shall make the balance of each such payment as it falls due. Trustee shall notify Company where principal and earnings are not sufficient.

Section 3. Trustee Responsibility Regarding Payments to Trust Beneficiary When Company Is Insolvent

(a) Trustee shall cease payment of benefits to Plan participants and their beneficiaries if the Company is Insolvent. Company shall be considered "Insolvent" for purposes of this Trust Agreement if (i) Company is unable to pay its debts as they become due, or (ii) Company is subject to a pending proceeding as a debtor under the United States Bankruptcy Code.

OPTIONAL

_____________________________ or (iii) Company is determined to be insolvent by ____________________ [insert names of applicable federal agency].

(b) At all times during the continuance of this Trust, as provided in Section i(d) hereof, the principal and income of the Trust shall be subject to claims of general creditors of Company under federal and state law as set forth below.

(1) The Board of Directors and the Chief Executive Officer [or substitute the title of the highest ranking officer of the Company] of Company shall have the duty to inform Trustee in writing of Company's Insolvency. If a person claiming to be a creditor of Company alleges in writing to Trustee that Company has become Insolvent, Trustee shall determine whether Company is Insolvent and, pending such determination,

Trustee shall discontinue payment of benefits to Plan participants or their beneficiaries.

(2) Unless Trustee has actual knowledge of Company's Insolvency, or has received notice from Company or a person claiming to be a creditor alleging that Company is Insolvent, Trustee shall have no duty to inquire whether Company is Insolvent. Trustee may in all events rely on such evidence concerning Company's solvency as may be furnished to Trustee and that provides Trustee with a reasonable basis for making a determination concerning Company's solvency.

(3) If at any time Trustee has determined that Company is Insolvent, Trustee shall discontinue payments to Plan participants or their beneficiaries and shall hold the assets of the Trust for the benefit of Company's general creditors. Nothing in this Trust Agreement shall in any way diminish any rights of Plan participants or their beneficiaries to pursue their rights as general creditors of Company with respect to benefits due under the Plan(s) or otherwise.

(4) Trustee shall resume the payment of benefits to Plan participants or their beneficiaries in accordance with Section 2 of this Trust Agreement only after Trustee has determined that Company is not Insolvent (or is no longer Insolvent).

(c) Provided that there are sufficient assets, if Trustee discontinues the payment of benefits from the Trust pursuant to Section 3(b) hereof and subsequently resumes such payments, the first payment following such discontinuance shall include the aggregate amount of all payments due to Plan participants or their beneficiaries under the terms of the Plan(s) for the period of such discontinuance, less the aggregate amount of any payments made to Plan participants or their beneficiaries by Company in lieu of the payments provided for hereunder during any such period of discontinuance.

Section 4. Payments to Company

[The following need not be included if the first alternative under i(b) is selected.]

Except as provided in Section 3 hereof, after the Trust has become irrevocable, Company shall have no right or power to direct Trustee to return to Company or to divert to others any of the Trust assets before all payment of benefits have been made to Plan participants and their beneficiaries pursuant to the terms of the Plan(s).

Section 5. Investment Authority

ALTERNATIVES - Select one provision, as appropriate

(a) In no event may Trustee invest in securities (including stock or rights to acquire stock) or obligations issued by Company, other than a de minimus amount held in common investment vehicles in which Trustee invests. All rights associated with assets of the Trust shall be exercised by Trustee or the person designated by Trustee, and shall in no event be exercisable by or rest with Plan participants.

(a) Trustee may invest in securities (including stock or rights to acquire stock) or obligations issued by Company. All rights associated with assets of the Trust shall be exercised by Trustee or the person designated by Trustee, and shall in no event be exercisable by or rest with Plan Participants.

OPTIONAL

_________________________ except that voting rights with respect to Trust assets will be exercised by Company,

OPTIONAL

________________________ except that dividend rights with respect to Trust assets will rest with Company.

OPTIONAL

Company shall have the right, at any time, and from time to time in its sole discretion, to substitute assets of equal fair market value for any asset held by the Trust.

[If the second Alternative 5(a) is selected, the trust must provide either (1) that the trust is revocable under Alternative l(b), or (2) the following provision must by included in the Trust]:

"Company shall have the right at any time, and from time to time in its sole discretion, to substitute assets of equal fair market value for any asset held by the Trust. This right is exercisable by company in a nonfiduciary capacity without the approval or consent of any person in a fiduciary capacity."

Section 6. Disposition of Income

ALTERNATIVES - Select one provision.

(a) During the term of this Trust, all income received by the Trust, net of expenses and taxes, shall be accumulated and reinvested.

(a) During the term of this Trust, all, or ______ [insert amount] part of the income received by the Trust, net of expenses and taxes, shall be returned to Company.

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Section 7. Accounting by Trustee

OPTIONAL

Trustee shall keep accurate and detailed records of all investments, receipts, disbursements, and all other transactions required to be made, including such specific records as shall be agreed upon in writing between Company and Trustee. Within ______ [insert number] days following the close of each calendar year and within ______ [insert number] days after the removal or resignation of Trustee, Trustee shall deliver to Company a written account of its administration of the Trust during such year or during the period from the close of the last Preceding year to the date of such removal or resignation, setting forth all investments, receipts, disbursements and other transactions effected by it, including a description of all securities and investments purchased and sold with the cost or net proceeds of such purchases or sales (accrued interest Paid or receivable being shown separately), and showing all cash, securities and other Property held in the Trust at the end of such year or as of the date of such removal or resignation as the case may be.

Section 8. Responsibility of Trustee

OPTIONAL

(a) Trustee shall act with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, provided, however, that Trustee shall incur no liability to any person for any action taken pursuant to a direction, request, or approval given by Company which is contemplated by, and in conformity with, the terms of the Plan(s) or this Trust and is given in writing by Company. In the event of a dispute between Company and a party, Trustee may apply to a court of competent jurisdiction to resolve the dispute.

OPTIONAL

(b) If Trustee undertakes or defends any litigation arising in connection with this Trust, Company agrees to indemnify Trustee against Trustee's costs, expenses and liabilities (including, without limitation, attorneys' fees and expenses) relating thereto and to be primarily liable for such payments. If Company does not pay such costs, expenses and liabilities in a reasonably timely manner, Trustee may obtain payment from the Trust.

OPTIONAL

(c) Trustee may consult with legal counsel (who may also be counsel for Company generally) with respect to any of its duties or obligations hereunder.

OPTIONAL

(d) Trustee may hire agents, accountants, actuaries, investment Advisors, financial consultants or other professionals to assist it in Performing any of its duties or obligations hereunder.

(e) Trustee shall have, without exclusion, all powers conferred on Trustees by applicable law, unless expressly provided otherwise herein, provided, however, that if an insurance policy is held as an asset of the Trust, Trustee shall have no power to name a beneficiary of the policy other than the Trust, to assign the policy (as distinct from conversion of the policy to a different form) other than to a successor Trustee, or to loan to any person the proceeds of any borrowing against such policy.

OPTIONAL

(f) However, notwithstanding the provisions of Section 8(e) above, Trustee may loan to Company the proceeds of any borrowing against an insurance policy held as an asset of the Trust.

(g) Notwithstanding any powers granted to Trustee pursuant to this Trust Agreement or to applicable law, Trustee shall not have any power that could give this Trust the objective of carrying on a business and dividing the gains therefrom, within the meaning of section 301.7701-2 of the Procedure and Administrative Regulations promulgated pursuant to the Internal Revenue Code.

Section 9. Compensation and Expenses of Trustee

OPTIONAL

Company shall pay all administrative and Trustee's fees and expenses. If not so paid, the fees and expenses shall be paid from the Trust.

Section 10.

(a) Trustee may resign at any time by written notice to Company, which shall be effective ______ [insert number] days after receipt of such notice unless Company and Trustee agree otherwise.

OPTIONAL

(b) Trustee may be removed by Company on ______ [insert number] days notice or upon shorter notice accepted by Trustee.

OPTIONAL

(c) Upon a Change of Control, as defined herein, Trustee may not be removed by Company for ______ [insert number] year (s)

OPTIONAL

(d) If Trustee resigns within ______ [insert number] year(s) after a Change of Control, as defined herein, Company shall apply to a court of competent Jurisdiction for the appointment of a successor Trustee or for instructions.

OPTIONAL

(e) If Trustee resigns or is removed within ______ [insert number] year(s) of a Change of Control as defined herein, Trustee shall select a successor Trustee in accordance with the provisions of Section 11(b) hereof prior to the effective date of Trustee's resignation or removal.

(f) Upon resignation or removal of Trustee and appointment of a successor Trustee, all assets shall subsequently be transferred to the successor Trustee. The transfer shall be completed within (insert number) days after receipt of notice of resignation, removal or transfer, unless Company extends the time limit.

(g) If Trustee resigns or is removed, a successor shall be appointed, in accordance with Section 11 hereof, by the effective date of resignation or removal under paragraphs) (a) [or (b)] of this section. If no such appointment has been made, Trustee may apply to a court of competent jurisdiction for appointment of a successor or for instructions. All expenses of Trustee in connection with the proceeding shall be allowed as administrative expenses of the Trust.

Section 11. Appointment of Successor

OPTIONAL

(a) If Trustee resigns or is removed in accordance with Section 10(a) [or (b)] hereof, Company may appoint any third party, such as a bank trust department or other party that may be granted corporate trustee powers as a successor. Said appointment shall be effective when accepted in writing by the new Trustee, who shall have all of the rights and powers of the former Trustee, including ownership rights in the Trust assets. The former Trustee shall execute any instrument necessary or reasonably requested by Company or the successor Trustee to evidence the transfer.

OPTIONAL

(b) If Trustee resigns or is removed pursuant to the provisions of Section 10(e) hereof and selects a successor Trustee. Trustee may appoint any third Party such as a bank trust department or other party that may be granted corporate trustee powers under state law. The appointment of a successor Trustee shall be effective when accepted in writing by the new Trustee. The new Trustee shall have all the rights and powers of the former Trustee, including ownership rights in Trust assets. The former Trustee shall execute any instrument necessary or reasonably requested by the successor Trustee to evidence the transfer.

OPTIONAL

(c) The successor Trustee need not examine the records and acts of any prior Trustee and may retain or dispose of existing Trust assets, subject to Sections 7 and 8 hereof. The successor Trustee shall not be responsible for and Company shall indemnify, and defend the successor Trustee from any claim or liability resulting from any action or inaction of any prior Trustee or from any other past event or any condition existing at the time it becomes successor Trustee.

Section 12. Amendment or Termination

(a) This Trust Agreement may be amended by a written instrument executed by Trustee and Company. (Unless the first alternative under 1(b) is selected, the following sentence must be included. Notwithstanding the foregoing, no such amendment shall conflict with the terms of the Plan(s) or shall make the Trust revocable after it has become irrevocable in accordance with Section i(b) hereof.

(b) The Trust shall not terminate until the date on which Plan participants and their beneficiaries are no longer entitled to benefits pursuant to the terms of the Plan(s) (unless the second alternative under i(b) is selected, the following must be included:, "unless sooner revoked in accordance with Section i(b) hereof." Upon termination of the Trust any assets remaining in the Trust shall be returned to Company.

OPTIONAL

(c) Upon written approval of Participants or beneficiaries entitled to payment of benefits pursuant to the terms of the Plan(s), Company may terminate this Trust prior to the time all benefit payments under the Plan(s) have been made. All assets in the Trust at termination shall be returned to Company.

OPTIONAL

(d) Section(s) ____[insert number(s)] of this Trust Agreement may not be amended by Company for ___ [insert number] years following a Change of Control, as defined herein.

Section 13. Miscellaneous

(a) Any provision of this Trust Agreement prohibited by law shall be ineffective to the extent of any such prohibition, without invalidating the remaining provisions hereof.

(b) Benefits payable to Plan participants and their beneficiaries under this Trust Agreement may not be anticipated, assigned (either at law or in equity), alienated, pledged, encumbered or subjected to attachment, garnishment levy, execution or other legal or equitable process.

(c) This Trust Agreement shall be governed by and construed in accordance with the laws of ________________________.

OPTIONAL

(d) For purposes of this Trust, Change of Control shall mean: [insert objective definition such as: "the purchase or other acquisition by any person, entity or group of persons, within the meaning of section 13(d) or 14(d) of the Securities Exchange Act of 1934 ("Act"), or any comparable successor provisions, of 1 ownership (within the meaning of Rule 13d-3 promulgated under the Act) of 30 percent or more of either the outstanding shares of common stock or the combined voting power of Company outstanding voting securities entitled to vote generally, or the approval by the stockholders of Company of a reorganization, merger, or consolidation, in each case, with respect to which persons who were stockholders of Company immediately prior to such reorganization, merger or consolidation do not, immediately thereafter, own more than 50 percent of the combined voting power entitled to vote generally in the election of directors of the reorganized, merged or consolidated Company's then outstanding securities, or a liquidation or dissolution of Company or of the sale of all or substantially all of Company's assets"].

Section 14. Effective Date

The effective date of this Trust Agreement shall be ______________, 200_.

j1H/Office/Speeches/SuprSpch.1

I

NSBA COUNCIL OF SCHOOL ATTORNEYS
2000 ADVOCACY SEMINAR

PRACTICE TIPS FOR DEFENDING AGAINST TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

Nancy Fredman Krent
Hodges, Loizzi, Eisenhammer, Rodick & Kohn
3030 Salt Creek Lane Suite 202
Arlington Heights IL 60005
(847) 670-9000
nkrent@hlerk.com

I. Legal Issues

- A. Know the standard for obtaining injunctive relief
- B. Common types of cases: student discipline, bidding disputes, public meetings

II. Practice tips

- A. Before an action is filed:
    1. Have shell pleadings ready
    2. Have citations to state authority on deference to school district decisions
    3. If district takes an action likely to lead to injunction action, try to approve actions and documents for underlying action
    4. Have district personnel on alert for filing of action
    5. Open lines of communication with opposing counsel (see Attachment A)
    6. Be prepared to respond to press inquiries
    7. Investigate forum issues
    8. Identify key witnesses and documents
    9. Investigate the underlying facts
- B. Once action is filed
    1. Determine forum issues

2. Devote adequate resources to prepare and present the case (may take several lawyers)

3. File removal pleadings if needed (see Attachment B)

4. Draft as many legal documents as possible (answer, motion to dismiss, brief). Filing of answer prevents court from assuming truth of complaint allegations in deciding motion for TRO.

5. Have copies of key cases available for court

6. Have District representatives present

C. If an evidentiary hearing is held

1. Identify and prepare all witnesses

2. Review all documents and pre-mark exhibits

3. Qualify District representatives as experts, if possible, on school issues

4. Present evidence on harm to the public interest, through impact on school operations or discipline

ATTACHMENT A

March 9, 2000

By Facsimile Transmission

Mr. Ian Greengross
Stephen, Wade, Zucker Ltd
33 North Dearborn Street
19th Floor
Chicago, IL 60602

Re: [redacted] High School District No. [redacted]

Dear Mr. Greengross:

This letter is to confirm your telephone conversation with Nancy Krent regarding your intent to file a complaint seeking a temporary restraining order regarding a potential suspension of certain students from the [redacted] High School Cheerleading Squad. As we discussed, our firm represents [redacted] High School District No. [redacted] regarding this matter.

In our conversation you advised me that if the Board of Education upholds the suspensions of certain members of the cheerleading squad that your firm, on the students' behalf, would file a complaint tomorrow morning in the Circuit Court of [redacted] County seeking a restraining order. You further advised us that you would send us a copy of your pleadings and motion on Friday, March 10th in the morning. You stated that you anticipated appearing before the emergency hearing judge for the Circuit Court of [redacted] County at 1:30 p.m. in the [redacted] Center.

Please fax us a copy of your pleadings and notice as soon as possible to afford us an opportunity to prepare a response for the court's consideration. Thank you for returning Nancy's call and we look forward to seeing you in court tomorrow if your clients deem it necessary to seek judicial relief. Of course, please call with any questions.

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Very truly yours,

HODGES, LOIZZI, EISENHAMMER,
RODICK & KOHN

Bennett Rodick

BR/blg

cc: Dr. Tom Madden

Lem-210/students/troltr.doc

One East Camelback Road
Suite 400
Phoenix, Arizona 85012-1649
602/230-5500
FAX 602/230-5598

Attorneys at Law in
Milwaukee and Madison, Wisconsin
West Palm Beach and Naples, Florida
Phoenix, Arizona

Quarles & Brady

September 13, 1995

Via Fax and First Class Mail

Terrance C. Mead, Esq.
Law Offices of Terrance C. Mead
6670 West Cactus Road
Suite A-105
Glendale, Arizona 85304-1656

Re: Barry [redacted] v. [redacted] Unified School District

Dear Mr. Mead:

At approximately 2:30 p.m., I received your letter faxed to the District at 11:10 a.m. this morning threatening litigation. The District has in excess of 20,000 students and the issue of a lunchtime restriction issued by an assistant principal and distribution of unauthorized leaflets requesting middle school students attend an all-age concert at a Phoenix bar has received considerable attention. Even your client recognized in correspondence with the District that "permission" was required to distribute leaflets on school property regardless of the substance of the material. Permission was denied to the student and the student told if he proceeded it would be considered insubordinate conduct. He decided to distribute the leaflets after being advised of consequences. You threaten litigation based upon a direct violation of valid school district policy dealing with non-school originated commercial material and the direct defiance of a school administrator's order under the District's Uniform Code of Student Conduct adopted pursuant to provisions of A.R.S. § 15-841.

Not only is your position to obtain injunctive relief on September 14, 1995 made in bad faith, but without a scintilla of legal authority for your position. Initially, you cite no cases for the proposition that Public Information Program Policy KB that deals with limits on material to be distributed or displayed on school property is unconstitutional. Various U.S. Supreme Court cases and other authorities have clearly provided discretion to school officials to limit first amendment rights on school property. The U.S. Supreme Court has authorized a school to discipline students for offensive inappropriate speech, Bethel School District v. Fraser, 478 U.S. 675 (1986) and to censor or control school newspapers where actions are reasonably related to legitimate pedagogical concerns, Hazelwood School District v. Kuhlmeier, (1988). Distributing a flyer to underage middle school students about a concert at a bar (or club with a liquor license) and then refusing to obey an administrator's directives are hardly protected free speech.

You complain about discipline, yet your client fails to exhaust administrative remedies under the [redacted] Unified School District's Code of Student Conduct. A lunch detention was authorized by an assistant principal and no appeal taken, even to the school's principal. There has been a threat of suit, but no constructive approach to resolve these issues by your client. While we would be glad to discuss these issues in depth with you, there is no irreparable harm; there is no authority for your position and any attempt to obtain injunctive relief will be fought not only with vigorous opposition, but with a request for attorneys' fees and sanctions.

I am currently involved in a statewide School Boards Association program on Thursday, Friday and Saturday. Since I am a speaker on Thursday, I cannot, and will not be able to appear in opposition to your injunctive request should you file one. I am, notifying the Clerk of the United States District Court for the District of Arizona of your position and the District's intentions to vehemently oppose any request for injunctive relief. There is no need for this matter to proceed until all available steps have been exhausted by your client and you provide some legal authority for your unique position. Although scheduled to be out of the office, if need be, I can be available on Friday, provided I know in advance and have received copies of your pleadings. The firm fax number is 602-230-5598. Any TRO or injunctive request relating to legitimate school policies and discipline authority will be opposed.

Please feel free to contact me with any questions.

Very truly yours,

Charles W. Herf

CWH/sru

cc: Dr. Duane K. Sheldon, Superintendent
Dr. Betty Pepper, Assistant Superintendent for Education Services
Ms. Cheryn Wall, Administrative Assistant for Community Services and Compliance Officer
[redacted], Principal
[redacted] Elementary School
Clerk of the United States District Court

Terrance C. Mead
Carol Lee Childress
Elizabeth A. Sobalvarro
Julie M. Storzer

September 14, 1995

VIA FACSIMILE

Mr. Charles W. Herf
Quarles & Brady
One East Camelback Road
Suite 400
Phoenix, Arizona 85012-1649

Re: [redacted] v. [redacted]

Dear Mr. Herf:

Thank you for your letter of late yesterday afternoon. Naturally, I contest your propositions and your allegations of bad faith.

My client cannot wait for your availability on Friday, since the flyers must be distributed at the schools before the weekend.

This letter is being provided pursuant to Fed. R. Civ. P. 65(b). Please be advised that I will be filing the attached complaint and seeking the attached temporary restraining order this morning. I have been delay and will not meet my original 8:30 a.m. projection. However, I will have my office telephone your firm when I am leaving. If you have an associate who will be covering for you, please advise my office so that I may direct the call to him or her.

In the event one of your associates is unable to appear, I will advise the court of your opposition and provide a copy of your correspondence.

Thank you for your attention.

Very truly yours,

Terrance C. Mead

TCM/gdi
Enclosures
cc: [redacted]

6670 West Cactus Road, Suite A-105, Glendale, AZ 85304-1656
Telephone (602) 412-2508 — FAX (602) 878-9153
After-hours (602) 547-0908

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ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

[redacted], by her Mother
and Next Friend, [redacted];
[redacted], by her Father
and Next Friend, [redacted];
[redacted], by her Mother and
Next Friend, [redacted]; and
[redacted], by her Mother
and Next Friend, [redacted],

Plaintiffs,

v. No.

[redacted] High School District No. [redacted] and
[redacted] High School District No. [redacted] School
Board, and their agents,

Defendants.

NOTICE OF REMOVAL

The Defendants, [redacted] High School District NO. [redacted], by and through their attorneys, Hodges, Loizzi, Eisenhammer, Rodick & Kohn, hereby file this Notice of Removal of this action filed in the Circuit Court of Cook County, Cook County, Illinois. Pursuant to 28 U.S.C. §1446(a) Defendants state the following in support of Removal:

1. On March 10, 2000, plaintiff initiated this civil action by filing a Complaint in the Circuit Court of Cook County. No copy has yet been served on defendants.

2. The Complaint raises state and federal claims. Specifically, according to plaintiffs' attorney, the Complaint alleges that the Defendants violated the Plaintiffs' Constitutional Fourteenth Amendment Due Process rights.

3. Because Plaintiff's Complaint involves a federal question, this action falls within the original

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jurisdiction of the federal courts pursuant to 28 U.S.C. §1331.

Accordingly, this action is removable to the Federal Court under 28 U.S.C. §1441(a).

Respectfully submitted,

[redacted] **High School District No.** [redacted]

By: ________________________________
One of the Attorneys for Defendants

Nancy Fredman Krent
Bennett Rodick
Julien H. Collins III
Hodges, Loizzi, Eisenhammer, Rodick & Kohn
3030 Salt Creek Lane, Suite 202
Arlington Heights, IL 60005
(847) 670-9000
(847) 670-7334 (Facsimile)

IN THE CIRCUIT COURT OF COOK COUNTY

[redacted] et al.,)
) Case No.:
Plaintiffs,)
)
vs.)
)
[redacted] TOWNSHIP HIGH SCHOOL)
DISTRICT NO. [redacted])
)
Defendant.)

NOTICE OF REMOVAL

Defendant, [redacted] High School District No. [redacted], by counsel, hereby provides notice that this action, currently pending in the Cook County Circuit Court, has been removed to the United States District Court for the Northern District of Illinois, by filing with that Court a Notice of Removal pursuant to 28 U.S.C. § 1446(a). A copy of the Notice of Removal is attached hereto.

Respectfully submitted,

By: ______________________________
One of the Attorneys for Defendant

Nancy Fredman Krent
Bennett Rodick
Julien H. Collins
Hodges, Loizzi, Eisenhammer,
Rodick & Kohn
3030 Salt Creek Lane, Suite 202
Arlington Heights, Illinois 60005
(847) 670-9000

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NSBA COUNCIL OF SCHOOL ATTORNEYS'

2000 ADVOCACY SEMINAR

TEMPORARY RESTRAINING ORDERS
AND
PRELIMINARY INJUNCTIONS

OCTOBER 13, 2000

Wigwam Resort
Litchfield Park, Arizona

Charles W. Herf
QUARLES & BRADY
One E. Camelback, Suite 400
Phoenix, Arizona 85012
(602) 230-5581
(602) 230-5598 (fax)
CWH@quarles.com

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This document provides information of a general nature regarding judicial, legislative or other developments. None of the information contained herein is intended as legal advice or an opinion relative to specific matters, facts, situations or issues and additional facts and information or future developments may affect the subjects addressed.

NSBA COUNCIL OF SCHOOL ATTORNEYS
2000 Advocacy Seminar
October 12-14, 2000

INDEX OF MATERIALS

1. Checklist of pleadings that may be necessary in filing or defending a temporary restraining order;
2. Complaint; Petition for Injunctive Relief and Temporary Restraining Orders; Jury Demand;
3. Motion and Supporting Memorandum to Vacate Restraining Order in Opposition to Plaintiff's Request for Preliminary Injunction;
4. Affidavit of James Lee;
5. Notice of Dismissal.

CHECKLIST OF PLEADINGS

The following checklist of pleadings may be of assistance in litigation where a public school system is seeking equitable relief, i.e., barring a disruptive or potentially dangerous adult or student or more likely defending a temporary restraining order or injunctive relief, which may cover a variety of subjects including but not limited to:

> Demand for immediate placement in a particular special education program; restraining the enforcement of a no tolerance policy relating to alcohol, drugs, weapons, enforcement of a uniform code of conduct; procurement disputes, First Amendment disputes relative to dissemination of literature or religious or political materials on campus, issues involving rights under the Equal Access Act, enforcement involving uniform or dress codes.

These examples are intended to provide the most frequent situations in which the equitable remedies of a temporary restraining order or preliminary injunction may be sought but are by no means intended to be all inclusive.

A. Plaintiff:

1. Cover Sheet;
2. Verified Complaint (must be verified if you want the judge to consider it as evidence on the Motion for TRO);
3. Certificate of Compulsory Arbitration (i.e., matter is not arbitrable);
4. Summonses;
5. Filing fee;
6. Motion for TRO and Order to Show Cause accompanied by;
7. A supporting Memorandum explaining legal position with any supporting affidavits as evidence;
8. Proposed TRO Order with findings of fact and conclusions of law;
9. If a TRO without notice is being sought, a Certificate of Counsel (certifying what efforts were made to give notice or why no notice was given);
10. Notice of Posting Bond and funds available to post the bond.

B. Defendant:

1. Cover Sheet;
2. Verified Answer (verification required if a verified complaint is filed and if judge is to consider it as evidence on the opposition to the Motion for TRO);
3. Certificate of Compulsory Arbitration (i.e., matter is not arbitrable);
4. Affidavits in Opposition to Request for Temporary Restraining Order;
5. Filing fee;
6. Opposition to Motion for Temporary Restraining Order and Order to Show Cause

Accompanied By;

7. Opposing Memorandum explaining why the plaintiff's legal position is defective and controverting any affidavits;
8. Proposed Order denying a TRO with findings of fact, conclusions of law and provision for award of attorneys' fees;
9. Memorandum in Opposition to bond and its adequacy; and
10. Memorandum seeking an award of attorneys fees for wrongful application for temporary restraining order.

C. Optional or Additional Pleadings:

1. Motion for Expedited discovery and order;
2. Motion and Order for non-destruction of evidence;
3. Motion and Order re: Protection of Confidential Information; and
4. Notice of Change of Judge.

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DISTRICT OF ARIZONA
BY ___ D DEPUTY

Attorneys for: Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[redacted], a minor child, by his best friend, [redacted] [redacted],

Plaintiffs,

v.

[redacted] UNIFIED SCHOOL DISTRICT #[redacted], and [redacted]

Defendants.

Case No. CIV 95-1930 PHX RGS

COMPLAINT; PETITION FOR INJUNCTIVE RELIEF AND TEMPORARY RESTRAINING ORDER; JURY DEMAND

This is an action for damages and injunctive relief for violations of plaintiffs' first amendment rights and is brought pursuant to the Civil Rights Act of 1964, 42 U.S.C. § 1983. For their complaint and petition for injunctive relief, plaintiffs allege as follows:

1. This court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

2. Venue in this district is appropriate pursuant to 28 U.S.C. § 1391(b) for the reasons that all actions alleged took

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place in this district and all defendants reside or are located in this district.

3. Plaintiffs are residents of [redacted] County, Arizona. Plaintiff [redacted] (hereafter, [redacted]) is a 13-year-old student at [redacted] Middle School in the [redacted] Unified School District. Plaintiff [redacted] is the father and legal custodian of [redacted].

4. Defendant [redacted] Unified School District [redacted] (hereafter, "district") is a political subdivision of the state of Arizona organized for the administration of public schools in the proximate area of the city of [redacted]. Defendant [redacted] (hereafter, [redacted]) is an employee of the district and [redacted] of [redacted] Middle School in [redacted] Arizona.

5. [redacted] and three other students of the district are members of a band that has planned a benefit concert for Saturday, September 16, 1995. In order to promote the concert, the students printed handbills and planned to distribute the handbills at their respective schools. See Affidavits of [redacted] and [redacted] attached hereto.

6. Pursuant to rules, regulations, policies and/or customs established and approved by its governing board, the district requires that all handbills and other publications be reviewed prior to distribution by students.

7. The district has adopted a student code of conduct allowing students to distribute written material, but allows school

administrators to prohibit the "distribution of any material which: (1) materially and substantially interferes or threatens to interfere with the requirements of good order in the operation of a school or schools, or (2) materially disrupts or threatens to disrupt a class or classes or classwork, or (3) involves or threatens to involve disorder, violence, or an invasion of the rights of other students, or (4) is libelous, defamatory, or obscene."

8. The handbills printed by [redacted] and his fellow students do not fall within the categories listed in the code of student conduct that would allow school administrators to prohibit their distribution.

9. Acting under color of state action and pursuant to rules, regulations, policies and/or customs established and approved by the governing board of the district, [redacted] has taken the following actions:

a. On or about September 7, 1995, [redacted] directed one of the students that he could not distribute the handbills at the school.

b. On or about September 8, 1995, [redacted] directed [redacted] that he could not distribute the handbills at the school.

c. On or about September 12, 1995, [redacted] confiscated the handbills from [redacted] and students to whom [redacted] had distributed the handbills and has failed and refused to return those handbills to [redacted]

d. On or about September 12, 1995, an assistant principal, acting under the direction and supervision of [redacted] ordered that [redacted] serve detention on September 14 and 15, 1995, for distributing the handbills in contravention of the ban previously imposed.

10. The district has approved and condoned the actions taken by Lee.

11. The actions taken by [redacted] were based primarily, if not exclusively, on the contents of the handbills.

12. The actions of defendants violate the first and fourteenth amendments to the United States Constitution.

13. The rules and regulations of defendants that require the prior review of district officials for distribution of written materials violate the first and fourteenth amendments to the United States Constitution.

14. The actions of the defendants have caused, and will continue to cause, irreparable harm to [redacted]

Wherefore, plaintiffs pray for the following relief:

1. Issuance of an order temporarily restraining defendants, their officers, agents, servants, employees, and attorneys and persons in active concert or participation with them, from any of the following acts:

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a. Requiring the approval of the content of any handbill or flyer prior to its distribution by plaintiffs and their agents on school property;

b. Seizing and/or continuing to withhold from plaintiffs or their agents any handbills or flyers belonging to plaintiffs;

c. Otherwise interfering with the distribution of any handbill or flyer by plaintiffs and their agents; and

d. Disciplining [redacted] or his agents for distributing any handbill or flyer in contravention of existing school policies or directives.

2. Preliminary and permanent injunctive relief to the same force and effect as the temporary restraining order;

3. Judgment declaring the rules and regulations of defendants that require the prior review of district officials for distribution of written materials violative of the first and fourteenth amendments to the United States Constitution and an order prohibiting the enforcement of such an order;

4. Judgment declaring the actions of defendants, as described above, to violate the first and fourteenth amendments to the United States Constitution;

5. Awarding damages in an amount to be proven at trial;

6. Awarding plaintiffs their attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 and other applicable law; and

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7. Granting such other and further relief deemed appropriate by the court.

Plaintiff further demands a trial by jury of all issues for which submission to a jury is proper.

Respectfully submitted.

LAW OFFICES OF TERRANCE C. MEAD

Terrance C. Mead
Julie M. Storzer
Attorneys for plaintiffs

VERIFICATION

STATE OF ARIZONA)
) ss.
County of [redacted])

[redacted] says that he is the plaintiff in the above-captioned action; that he has read the foregoing Complaint, knows the contents thereof and that the same are true to the best of his knowledge and belief.

[redacted]

Subscribed and sworn to before me this 13th day of September, 1995, by [redacted]

(Seal and Expiration Date)

OFFICIAL SEAL
GAIL DIANNE IVEY
Notary Public-State of Arizona
MARICOPA COUNTY
My Comm. Exp. Oct. 4, 1997

Gail Dianne Ivey
Notary Public

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of [redacted])

[redacted], being first duly sworn, deposes and states:

1. I was born on [redacted], in Chicago, Illinois. I currently reside at [redacted]

2. I am a student at [redacted] Middle School, located at [redacted] I am presently in the seventh grade.

3. I am a member of the band, [redacted]. We are scheduled to perform at the Mason Jar, in Phoenix, on September 16, 1995, at 6 p.m.

4. All proceeds earned by the band will be donated to St. Mary's Food Bank for the purpose of providing food to hungry people.

5. In order to promote the benefit concert, the band had flyers printed, which all members of the band agreed to distribute to friends and acquaintances at our respective schools. A true and correct copy of the flyer is attached hereto.

6. I brought approximately 125 flyers to the school on or about September 7, 1995, with the intention to pass them out before and after school, during lunch period and between classes.

7. The night before I had given approximately 125 flyers to [redacted], an eighth grade student at [redacted], who is a member of [redacted]. [redacted] is president of the

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student council. [redacted] told me that he would bring the flyers to the principal, Mr. [redacted] prior to passing them out. This is a requirement stated in the [redacted] Unified School District Code of Conduct. Later, [redacted] told me that Mr. [redacted] would not allow the flyers to be passed out in the school. I did not pass out the flyers at that time.

8. On or about September 8, 1995, Mr. [redacted] told me that I could not pass out the flyers. He told me the school "does not promote parties." He stated that the Mason Jar was a bar, and the school district would not allow the distribution of flyers if an establishment serves alcohol. I told Mr. [redacted] that the Mason Jar was not a bar, but a club that has an alcohol license. Mr. [redacted] told me that he understood no alcohol would be served at the performance, but said he feared parents might get angry thinking alcohol would be served. When I asked Mr. [redacted] if this policy would be in effect for birthday parties held at restaurants that served liquor, he said, "That is different."

9. Later, on September 8, 1995, Mr. [redacted] told me that I could not pass out the flyers. He said the school also objected to the fact that the Mason Jar would be "making money." He told me he understood that the band would be giving its entire proceeds to charity. He said that the school could not allow advertising if someone was making a profit. When I asked him if that was true for the companies that sell student fundraising, I was again told, "That is different."

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10. On September 8, 1995, I told Mr. [redacted] that I felt my first amendment rights under the U.S. Constitution were being violated by prohibiting me from passing out the flyers. Mr. [redacted] told me the school had the right to prevent me from passing the flyers out. I asked him what the consequence would be if I passed the flyers out. He stated that I would be punished for "insubordination" and probably "suspended."

11. On September 12, 1995, I distributed the flyers during my lunch period. Mr. [redacted] the assistant principal, approached me, took the flyers from my hand, and asked me how many I passed out. I told him I passed out "a lot." Mr. [redacted] gave the flyers to Mr. [redacted] who told me to get back the flyers. I refused to get them back from the students. At that time, I was told to go to the office.

12. Later, in the office, Mr. [redacted] told me I was guilty of insubordination and that I would be punished. I told him that, according to the [redacted] Unified School District policy, I could not be punished for exercising my right to publish. I showed him the policy. Mr. [redacted] filled out a pink form title "Lunch Detention" stating that I had to serve two days of lunch detention. I was asked to sign the form, but refused since I did not understand how I could be punished for exercising my constitutional rights. I wrote that I felt that the notice was a violation of district policy. A true and correct copy of the form is attached hereto. I told Mr. [redacted] hat I wanted to appeal the decision

according to the district policy that allows for an immediate appeal. Although he told me I could appeal the punishment, he would not set a time or place for the appeal.

13. On September 12, 1995, several students told me that the flyers I passed out were confiscated. I do not know the names of all the students who told me this; however, this was reported to me by [redacted] and [redacted].

14. Because of being detained in the office, I missed about 25 minutes of class time.

[redacted]

Subscribed and sworn to before me this 13th day of September, 1995, by [redacted]

OFFICIAL SEAL
GAIL DIANNE IVEY
Notary Public-State of Arizona
MARICOPA COUNTY
My Comm. Exp. Oct. 4, 1997

Gail Dianne Ivey
Notary Public

9/21/95

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DISTRICT OF ARIZONA
BY ___ C DEPUTY

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[redacted], a minor child, by his best friend, [redacted] [redacted]

Plaintiff,

v.

[redacted] UNIFIED SCHOOL DISTRICT NO. [redacted] and [redacted],

Defendants.

No. CIV 95-1930 PHX-RGS

MOTION AND SUPPORTING MEMORANDUM TO VACATE RESTRAINING ORDER AND OPPOSITION TO PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION

[redacted] Unified School District No. [redacted] of [redacted] County, [redacted] ("District") and [redacted], Defendants, by and through their counsel, Quarles & Brady (Charles W. Herf and Jose L. Martinez), move that this Court vacate the Temporary Restraining Order ("TRO") and deny the Plaintiffs' request for preliminary injunction. This Motion is based on the following Memorandum of Points and Authorities and related Statement of Facts, and all pleadings on file in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves the balancing of the rights of a local public school site administrator to make judgmental decisions regarding the operation of his campus according to District Policies, Rules and Regulations and the Uniform Code of Student Conduct as contrasted to the right of the judicial system to intervene and make determinations that solicitations in public schools to attend commercial events (i.e., distribution of a flyer advertising a concert at a local bar) have First

Amendment protections. The balance of rights in this case factually and legally favors the decision of the school administrator.

This case does not involve a suppression of First Amendment rights! Students in public school have limited First Amendment rights and distributing a flyer announcing a concert at a local bar is not a student's right under the First Amendment. The First Amendment does not prohibit a public school administrator from imposing discipline on students who disobey a directive not to distribute materials which have been determined to be against school district policies and inconsistent with the school's educational mission.

The [redacted] Unified School District No. [redacted] of [redacted] County ("District") is a political subdivision of the State of [redacted]. As a matter of law, the District is ruled by a Governing Board which has adopted District policies to assure its proper management and policies which provide for the discipline of students. The Governing Board has delegated authority in the administration of the day-to-day affairs of its District to its site administrators, known as building principals. The District has a broad prohibition against solicitation for commercial or noncommercial events utilizing students or District employees as a source for advertising, whether it be oral, posting or by distribution of flyers. This prohibition is content neutral and does not discriminate, but the District does have the discretion to determine on a case-by-case basis whether or not a particular advertisement is suitable for posting in the school system. School administrators have the right to make judgmental decisions concerning whether or not materials distributed at a school may reasonably give the imprint or impression that they are school approved or endorsed. In other words, the school administrator can make a judgment call to disassociate the

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school from certain speech based on his or her knowledge and understanding of the parents in the community and the mission of the school.

This case involves one of those judgment calls. The school administration determined that a flyer advertising a concert at a local bar which serves alcohol at the same time it permits middle school age students to mix and mingle with alcohol consuming patrons in contrary to the school's mission. This judgment call cannot be second guessed by the courts.

At the telephonic hearing on the Plaintiffs' request for a Temporary Restraining Order, it was alleged that [redacted] First and Fourteenth Amendment rights were violated by denying his request that certain flyers be distributed at school. The Plaintiffs have materially omitted certain facts and mischaracterized others in an effort to change the focus of this case. This is not a prior restriction. The true question presented in this case is the appropriateness of material distributed at a middle school campus and the appropriateness of the discipline which was issued for disobeying the school administrator's directive.

It is undisputed that no disciplinary action was taken because [redacted] failed to obtain pre-approval before he distributed the flyers in question. [redacted] was disciplined because the materials he sought to distribute were contrary to applicable District policies and practices and because he refused to obey his principal's directive that he refrain from distributing flyers advertising a concert at a [redacted] bar.

In compliance with the Court's Temporary Restraining Order, [redacted] was allowed to distribute the flyers at the school and the concert advertised on the flyer took place on September 16, 1995. The District issued a disciplinary notice to [redacted] before this Court's Order but it has not yet enforced the disciplinary action. School officials are entirely within their authority under the First Amendment and District policies to limit restrictions of objectionable materials by students and to discipline [redacted] for directly refusing to follow his principal's directives with knowledge of the consequences.

II. ARGUMENT

A. The Standard for Preliminary Injunctions.

The Ninth Circuit has adopted an "alternative standard" for preliminary injunction motions under which a preliminary injunction may be granted when the moving party demonstrates either: (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits and that the balance of hardship tips sharply in its favor. International Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819, 822 (9th Cir. 1993), citing Cassim v. Bowen, 824 F.2d 791, 795 (9th Cir. 1987). These are not two distinct tests. Rather, they are opposite ends of a single continuum in which the required showing of harm varies inversely with the required showing of meritoriousness. Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987).

B. The Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits.

The Plaintiffs' request for a preliminary injunction must be denied because they cannot demonstrate that they are likely to succeed on the merits. On the contrary, the law is clear that the student speech in public schools is limited and that local public school officials have right to control the type of speech that is at issue in this case.

1. Students in Public Schools have Limited First Amendment Rights.

It is well-established that students in public schools do not have the full panoply of First Amendment freedoms that they enjoy outside of the school setting. Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)(The First Amendment rights of students in public schools are not "automatically coextensive with the rights of adults in other settings"). Public schools can prohibit student speech that is contrary to a particular school's educational concerns and that decision cannot be second guessed by the courts. Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)("We thus recognized that '[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board'"); Chandler v. McMinnville School District, 978 F.2d 524 9th Cir. (1992) ("Schools need not tolerate student speech that is inconsistent with the schools' 'basic educational mission'").

2. The Hazelwood Standard

The United States Supreme Court in Hazelwood set forth the proper analytical framework for determining when a school can restrict student speech. Under Hazelwood, a public school can control students' speech on school property in situations where "a reasonable person would view [speech' as bearing the imprimatur of the school." (Emphasis added). If the Hazelwood test applies in a particular situation (and it applies in this case), a school can exercise editorial control of content of student speech in school sponsored activities so long as the restriction is "reasonably related to legitimate pedagogical concerns." Id. at 272. This standard is consistent with their "oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not federal judges." Id.

3. Ninth Circuit Cases After Hazelwood Have Confirmed that a Public School Can Prohibit Speech that can Reasonably by Imputed to the School if the Restriction is Related to Legitimate Pedagogical Concerns

The Ninth Circuit's most recent elaboration on the Hazelwood test is Chandler v. McMinnville School District, 978 F.2d 524 9th Cir. (1992). Although Chandler involved a political issue and not distribution of commercial materials, it recognized that speech viewed as sponsored or imprinted with the approval of the school, it is one of three categories of speech. This category provides the District with broad ranges of discretion and substantial control over student publications. The court stated at 978 F.2d 528:

> We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories.

In discussing the category of speech which is involved in the instant case (i.e. school sponsored speeches), the court stated at 978 F.2d 529 as follows:

> We turn next to the second category involving speech or speech-related activities that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." In such cases, school officials are entitled to "greater control" over student expression. Id. at 271, 108 S.Ct. at 570. A school has the discretion to "disassociate itself" from an entire range of speech, including "speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." Id. (internal quotations omitted). According to Hazelwood, federal courts are to defer to a school's decision to suppress or punish vulgar, lewd, or plainly offensive speech, and to "disassociate itself" from speech that a reasonable

> person would view as bearing the imprimatur of the school, when the decision is "reasonably related to legitimate pedagogical concerns." Id. at 271, 273, 108 S.Ct. at 570, 571.

The Ninth Circuit also applied Hazelwood in Planned Parenthood of Southern Nevada, Inc. v. Clark County School District, 941 F.2d 817 (9th Cir. 1991). In Planned Parenthood, a commercial case similar to the distribution of handbills that advertise an event at a commercial institution that will profit from the student's attendance, the court affirmed the school district's decision to refuse to accept Planned Parenthood's advertisements in student newspapers, yearbooks and athletic programs.

The Ninth Circuit court stated at 941 F.2d 819:

> Principals are allowed to decide whether to accept advertising for these publications, to establish guidelines regulating acceptable advertisements and to determine whether a proposed advertisement satisfied the guidelines, if any.

Following the reasoning in Hazelwood, the court recognized that the determination of what manner of speech is appropriate in the classroom or in school assembly properly rests with the school board rather than the federal court:

> Looking to the factors in this case that the court found significant in Hazelwood leads us to the same conclusion. The school district and its principals treated all publications similarly. Their intent is most clearly evidenced by written policies that explicitly reserve the right to control content. Their practices were not inconsistent with these policies. Pursuant to them, advertising in school sponsored publications was subject to the same right of approval as articles in the Spectrum. We therefore cannot conclude on the record in this case that the school district clearly intended to open its publications, including advertising space for indiscriminate use. Rather, like the school board in Hazelwood, the school district here showed an infirmative intent to retain editorial control and responsibility over all publications and advertising disseminated under the auspices of its schools.

Planned Parenthood, 941 F.2d 823-824.

Relying on Hazelwood, Planned Parenthood discussed the theory of "imputation":

> The court recognized that school authorities have legitimate educational interests insuring that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may in appropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.

Chandler, 941 F.2d 828. What Planned Parenthood means is that school officials have legitimate interests in controlling particular "speech" or writing which may be imputed to the school such as a publication distributed to middle school students advertising an event at a bar.

The court further went on to say that while a publisher is not normally viewed as endorsing contents of advertisements, a school stands in a different relationship with its public than a newspaper of general circulation. The court was concerned (as was [redacted] that the distribution of the particular advertisement in that case could well be imputed to the school and found to objectionable by parents. Id. at 828.

The court stated at as follows in support of the Clark County School District:

> A school's decision not to promote or sponsor speech that is unsuitable for immature audiences, or which might place it on one side of a controversial issue, is a judgment call which Hazelwood reposes in the discretion of school officials and which is afforded substantial deference. We therefore conclude that the controlling of content of school sponsored publications so as to maintain the appearance of neutrality in a controversial issue is within the reserved mission of the Clark County School District.

Id. at 828.

The court concluded that the school district could reasonably decline not to have the family planning debate take place in the newspaper.

3. Based on the Analytical Framework Set Forth in Hazelwood, Chandler, and Planned Parenthood, the Defendants' Conduct in this Case did not Violate the First Amendment

Hazelwood and its Ninth Circuit progeny compels denial of the Plaintiffs' request for a preliminary injunction. Defendants have a legal right to preclude distribution of materials in the school if the materials bear the "imprimatur of the school" or if they impute "endorsement of the contents" to the school so long as the restriction is "reasonably related to legitimate pedagogical concerns." Both of these prongs exist in this case.

First, the flyer which [redacted] distributed at the school could reasonably be viewed as bearing the "imprimatur" of the school or as an "endorsement" of the function which was advertised on the flyer. The District has policies designed to control commercial solicitations and that require pre-approval prior to distribution or display of any such materials. District policy prohibits public solicitation on the school campus and expressly instructs the District to "make all reasonable attempts to prevent money-raising organizations, commercial enterprises, and individuals that are not directly sponsored by school authorities or school organizations from contacting parents and students through the schools." It was reasonable for Mr. [redacted] to conclude that readers of the flyers (which would include parents and students) to conclude that the school had endorsed the flyers or that the flyers had been distributed with school approval. The flyer asked the readers to call a telephone number to arrange for rides to the concert and apparently students were picked up at or adjacent to the school (without notice, knowledge or authority of District officials), taken to the bar and returned to a location on or adjacent to school property. These factors could reasonably permit parents to conclude the flyers had been approved or endorsed by the school.

Second, a school district's enforcement of a solicitation policy is reasonably related to legitimate pedagogical concerns. The Mason Jar Nite Club is listed in the yellow pages as a "night club" and is an establishment where alcoholic beverages are sold to and consumed by individuals over 21 years of age. On September 16, 1995, parents were told that adults would be drinking alcohol while their middle school age children (unaccompanied) were socializing in the same commercial establishment.

A.R.S. § 4-241 makes it illegal for a liquor licensee to allow minors to remain in an area on the licensed premises when liquor is being served. It is ludicrous for the Plaintiffs to suggest that the school's decision not to promote distribution of a flyer publicizing a concert at a bar which serves alcoholic beverages when minors are present on the premises (in contravention of state law) is not reasonably related to legitimate school concerns. As in Planned Parenthood, the Defendants made "a judgment call" that this activity could be detrimental to the school's education mission and that the school did not want to be associated with that activity in any fashion. This decision is entitled to "substantial deference."

The principal's decision that this flyer could not be distributed because it could reasonably be viewed as endorsement of an event which might be detrimental to middle school children was supported by a letter received from a concerned parent [redacted]upplemental Affidavit Exhibit A). This letter is indicative of the issue and resentment in the community that a child could come home from school with a commercial flyer suggesting a party at a bar. The owner of the Mason Jar candidly advised the interested middle school parent that alcohol is served to patrons over 21 while thirteen and fourteen year old students from a Scottsdale middle school are supporting a local school band.

If public schools cannot restrict the distribution of commercial advertisements or solicitations to bars particularly when the subject matter advertised is illegal (even if the solicitation is on behalf of well-meaning student bands who wish to engage in fund raising promotions on school grounds), any commercial establishment could deliver similar messages under the TRO granted by this Court on September 15, 1995. District policy prohibits solicitation and lawfully vests discretion on the site administrator to limit and to prohibit distribution of commercial solicitations (such as the flyer in question in this case) when the commercial solicitation can be perceived as school sponsored speech and where the solicitation is reasonably related to legitimate pedagogical concerns.

3. **This Case Does Not Involve A Prior Restraint**.

District Policy KB is not a prior restraint pursuant to Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988). Burch is factually and legally distinguishable.

In Burch, the school principal censured the students for not submitting the materials prior to distribution. The focus of the decision was on regulations "aimed as suppressing speech before it is uttered, as opposed to punishment of individuals after the expression has occurred." Id. at 1154.

[redacted] was disciplined because he distributed the flyers in direct contravention of the principal's direct instructions, i.e., insubordination. A court's second guessing of every school official's discipline decision on insubordinate conduct would impermissibly link the court with the day-to-day and minute-to-minute of decisions made by public school administrators.

Burch does not apply because that Court distinguished Hazelwood and limited its decision to distribution of materials that could not be reasonably construed as school sponsored.

4. **Commercial Speech has only limited first amendment protection.**

The Plaintiffs are not likely to succeed on the merits for another reason. The constitution accords "a lesser protection to commercial speech than to other constitutionally guaranteed expression." Central Hudson Gas V. Public Service Commission of New York, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350 (1980).[1]

The Central Hudson court established a four part test to determine whether commercial speech would be protected by the first amendment. To be protected, the speech must "concern lawful activity" and "not be misleading." Next the court must ask whether the asserted governmental interest is "substantial." If both inquiries yield positive answers, the court must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. Central Hudson 100 S.Ct. at 2351.

Arizona law makes it illegal for minors to consume alcoholic beverages. A.R.S. § 4-241. It is illegal for a liquor licensee to allow minors to remain in an area on the licensed premises, during those hours in which its primary use is the sale, dispensing or consumption of alcoholic beverages. A.R.S. § 4-244 (23). The primary business of the Mason Jar on September 16, 1995 was the sale, dispensing or consumption of alcoholic beverages secondarily supported by simultaneously charging an admission fee to observe a band and sell minors soft drinks. The flyer that promotes these unlawful activities is commercial speech that has no first amendment protection.

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[1] Commercial speech is speech which proposes a commercial transaction. Virginia Pharmacy Board v. Virginia citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 1825 (1976). There can be no doubt that the handbill distributed by the plaintiff proposed a commercial transaction. The flyer invited students to come to The Mason Jar with a can of food for admission and advised them that there would be a show and that t-shirts would be available.

Even if the communication does not promote an unlawful activity, the School District has a substantial interest in preserving an environment conducive to learning and free from commercial distractions that may be counterproductive to its educational mission has been recognized by courts on every level. See e.g. Veronia School Dist. 47J v. Acton, 1995 WL 373274(US) -- U.S. -- (1995). Schools need not tolerate student speech that is inconsistent with the school's 'basic educational mission.'" Chandler at 527 quoting Hazelwood, at 567. There can be no doubt that by controlling access to school campuses by advertisers and other promoters of commercial speech, the District advances its interest in limiting student distractions and creating a healthy learning environment.

Additionally, the District's policy with regard to commercial speech is not more extensive than is necessary to serve the desired objective of harmonious learning. Commercial speech in general enjoys a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values" and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 477, 456, 98 S. Ct. 1912, 1918 (1978). The District's interest in preserving an environment conducive to learning and free from commercial distractions is essential to its educational mission. The District's prohibition of commercial speech clearly fits with its strong interest and the low protection afforded commercial speech. Under Central Hudson the district has every right to prohibit the Plaintiff's commercial expression.

C. The Plaintiffs Cannot Demonstrate Irreparable Harm.

As stated at the outset, a moving party who makes a weak showing of probable success on the merits would have to show a higher threshold of harm in order to obtain a preliminary injunction. The Plaintiffs in this case cannot meet this threshold.

[redacted] has already uttered the speech that is in question in this lawsuit. He distributed the flyers despite the principal's instruction and the concert has already occurred. The only remaining issue is whether the lunch detention discipline was appropriate under the First Amendment. Any damages resulting from the lunch detention, if any, can be proven at trial and it is inappropriate to enjoin the defendants on that basis.

III. REQUEST FOR DAMAGES

The defendants have been required to spend significant time and resources in preparing this Motion to Vacate the Restraining Order. Federal Rule of Civil Procedure 65(c) requires the Plaintiff to give security for the payment of the costs and damages that may be incurred or suffered by the party who is found to have been wrongfully enjoined or restrained.

The costs incurred in attempting to vacate this wrongful Restraining Order have damaged the Defendants. The Defendants are entitled to a recovery for those damages in an amount to be proven by affidavit or other evidence after resolution of the lawsuit.

CONCLUSION

For all the foregoing reasons, Defendants request that this Court vacate the Temporary Restraining Order, enter an order denying the motion for a preliminary injunction and grant Defendants their attorneys' fees.

DATED this 21st day of September, 1995.

QUARLES & BRADY

By______________________________
Charles W. Herf
Jose L. Martinez
Attorneys for Defendants

ORIGINAL and **ONE** copy of the foregoing filed with the Clerk of the District Court, District of Arizona, this 21st day of September, 1995:

COPY of the foregoing hand-delivered this 21st day of September, 1995 to:

The Honorable Roger G. Strand
United States District Court
230 N. First Avenue
Phoenix, Arizona 85025

Terrance C. Mead, Esq.
6670 West Cactus Road, Suite A-105
Glendale, Arizona 85304-1656
Attorneys for Plaintiff

____

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Attorneys for Defendants

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SEP 21 1995
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY C DEPUTY

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[redacted], a minor child, by his best friend, [redacted] [redacted],

Plaintiff,

v.

[redacted] UNIFIED SCHOOL DISTRICT NO. [redacted] and [redacted]

Defendants.

No. CIV 95-1930 PHX-RGS

AFFIDAVIT OF [redacted]

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, [redacted], being first duly sworn deposes as follows:

1. As the Principal of [redacted] Middle School, [redacted] Unified School District No. [redacted] I have personal knowledge of all of the facts asserted in this Affidavit.

2. The Governing Board of the school district is responsible for district wide policies to assure that the school district can be operated in an efficient and effective manner free from disruption and to deliver the maximum amount of educational services to its students.

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3. The [redacted] Unified School District Governing Board has expressly approved a policy regarding distribution or releases of information from the schools which is designated Policy "KB," a true and correct copy of which is attached hereto as Exhibit "A";

4. The [redacted] Unified School District Governing Board has expressly approved a policy regarding public solicitation in the schools which is designated Policy "KI" and is attached hereto as Exhibit B.

5. The Governing Board has adopted a series of rules for the conduct of students at its schools entitled the "Uniform Code of Student Conduct," a true and correct copy of which is attached hereto as Exhibit "C";

6. [redacted] Middle School is a school located within the jurisdiction of the [redacted] Unified School District;

7. [redacted] is a seventh grade student at [redacted] Middle School located at [redacted]

8. On or about September 7, 1995, I was asked for permission to distribute certain flyers to students at the school. A true and correct copy of the flyer is attached hereto as Exhibit "D";

9. I initially determined that the flyers which I was asked for permission to distribute were inappropriate because of the potential that the school would be recognized as sponsoring or tacitly approving the event to be held at a bar;

10. In order to assure that his reaction and concerns for the impression left on parents and other members of the community by the distribution of this flyer at school and on school property was accurate, I presented the issue to the assembled group of middle school principals on September 7, 1995;

11. It was the unanimous consensus of the group of middle school principals that had assembled that distributing the flyer on school time and property with the knowledge of the administration was inappropriate because:

(a) It reflected a profit oriented situation, i.e., the Mason Jar selling refreshments to middle school students and commercial and advertising materials are not allowed on campus; and

(b) That it left the impression that the flyer was either tacitly or expressly approved by the school, if not school sponsored, because of its origins of distribution, and that the event was to be held at a location primarily known as a bar which has a liquor license with the imprint or tacit approval of the school district.

12. On or about September 8, 1995, I advised [redacted] [redacted] that the flyers were not to be passed out because the District does not want the impression that it supports commercial adventures and would not want parents to be left with the impression that the school tacitly or implicitly sponsored or promoted an event at a bar;

13. [redacted]s protested the statement saying that the Mason Jar was not a bar, but a club that had an alcohol license and no alcohol would be served;

14. I also advised [redacted] that although his band might be donating services for a worthwhile cause, the Mason Jar was a commercial enterprise and the school did not promote or allow distribution of commercial material that was profit oriented;

15. [redacted] asked me what would happen if he passed out the flyers anyhow. I responded that he would be disciplined for insubordination if he decided to disobey my directive;

16. In total disregard of my directives as building principal on Tuesday, September 12, 1995, [redacted] distributed the flyers. At my direction and under my supervision, [redacted] the assistant principal, took possession of the remaining flyers and directed [redacted] [redacted] retrieve those flyers that he had distributed contrary to my orders. [redacted] promptly advised Mr. [redacted] that he would not take any efforts to retrieve the flyers distributed in that manner;

17. As a result of the direct disobedience of my directive, Mr. [redacted] on September 12, 1995, issued a lunch detention notice to [redacted] attached hereto as Exhibit "E," which states the following as the reason for the detention: "Insubordination. Refusal to respond to a reasonable request by

an administrator. Passed out brochure when told not to [and] refused to pick up brochures he had passed out."

[redacted]

Subscribed and sworn to before me this 20 day of September, 1995.

Sandra J Froelich
Notary Public

My Commission Expires:
November 29, 1995

OFFICIAL
SANDRA J. F
NOTARY PUBLIC - STATE OF A
MARICOPA COUNTY
My Comm. Expires Nov. 29, 1995

BEST COPY AVAILABLE

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Attorneys for: Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[redacted], a minor child,)
by his best friend, [redacted])
[redacted])
)
Plaintiffs,)
)
v.)
)
[redacted] UNIFIED SCHOOL)
DISTRICT [redacted], and [redacted])
)
Defendants.)
)

Cause No. CV 95-1930 PHX RGS

NOTICE OF DISMISSAL

Plaintiff, by his attorneys undersigned, hereby gives notice pursuant to Fed. R. Civ. P. 41(a)(1) that he the above-captioned action is dismissed.

Dated this 21st day of March, 1997.

MEAD & ASSOCIATES

Terrance C. Mead
Attorneys for plaintiff

Copy of the foregoing faxed and mailed this 21st day of March, 1997, to:

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Attorneys for Defendants

Diana Gallowell

J

HIGH STAKES TESTING

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I. "High Stakes" Testing

A. State's Authority to administer "high stakes" tests

1. The Tenth Amendment

   "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. Amend. X.

   A state's power over education comes from the power reserved to the states through the Tenth Amendment of the U.S. Constitution. Debra P v. Turlington, 644 F.2d 397, 402 (5th Cir. 1981). This power is typically defined in a state's constitution. Id.

2. "[A] state may determine the length, manner and context of any education it provides," as long as its actions do not violate the U.S. Constitution. Id. at 403. Accordingly, it appears states have the right to administer "high stakes" tests in their school systems as part of monitoring and maintaining a quality education.

B. School District's Authority to set graduation requirements

1. Setting standards for the receipt of a high school diploma "is appropriately a judgment call for the persons elected for that state responsibility and those experienced for educating and preparing students to achieve the established level of competence." Williams v. Austin, 796 F. Supp. 251, 256 (W.D. Tex. 1992).

2. Deference is given to school authorities regarding educational requirements including establishing minimum standards for graduation; therefore "courts will interfere with educational policy decisions only when necessary to protect individual statutory or constitutional rights." Brookhart v. Illinois

State Bd. of Educ., 697 F.2d 179, 182 (7th Cir. 1983). See also, Board of Educ. v. Ambach, 90 A.D.2d 227 (N.Y. App. Div. 1982); Rankins v. Louisiana State Bd. of Elementary & Secondary Educ., 637 So.2d 548 (La. App. 1994).

3. "This case is also remarkable for what it does not present for the Court's consideration. In spite of the diverse and contentious opinions surrounding the use of the TAAS test, this Court has not been asked to--and indeed could not--rule on the wisdom of standardized examinations. This Court has no authority to tell the State of Texas what a well-educated high school graduate should demonstrably know at the end of twelve years of education. Nor may this Court determine the relative merits of teacher evaluation and 'objective' testing." G. I. Forum v. Texas Educ. Agency, 87 F. Supp. 2d 667, 670 (W.D. Tex. 2000).

C. Caution: Be sure to evaluate the cases as they differentiate between tests that are used to measure demonstrated knowledge of educational items needed for graduation versus tests used to determine admission to programs and receipt of benefits. See e.g., Groves v. Alabama State Board of Education, 776 F. Supp. 1518 (M.D. Ala. 1991) (use of ACT scores to determine entrance to undergraduate teacher training programs); Sharif v. New York State Education Department, 709 F. Supp. 345 (S.D.N.Y. 1989) (sex-based challenge to the use of the SAT results to award scholarships).

D. Resource: "The Use of Tests When Making High-Stakes Decisions for Students: A Resource Guide for Educators and Policymakers". Draft document prepared by the Office for Civil Rights.

E. Legal Issues with High Stakes Testing

The Fourteenth Amendment, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. U.S. Const., Amend. XIV, §1.

1. Equal Protection

a. The seminal case in the area of discrimination and high stakes testing is the Fifth Circuit decision in Debra P v. Turlington, 644 F.2d 397

(5th Cir. 1981). This suit was a class action by students challenging the use of Florida's Educational Accountability Act of 1976 to award diplomas. The students had to meet three standards for graduation: (1) complete the minimum number of credits; (2) master certain basic skills; and (3) perform satisfactorily in functional literacy as shown by performance on a statewide test. Each school district was required to develop a remediation program. When the test was administered in the Fall of 1977, 78% of the black students failed as compared to 25% of the white students. In the Fall of 1978, 74% of the black students failed as compared to 25% of the white students; and in the Spring of 1978, 60% of the black students failed as compared to 36% of the white students.

> "In attempting to justify the use of an examination having such a disproportionate impact upon one race, the appellants failed to demonstrate either that the disproportionate failure of blacks was not due to the present effects of past intentional segregation or, that as presently used, the diploma sanction was necessary to remedy those effects. *** The trial judge was, therefore, correct in holding that the immediate use of the diploma sanction would punish black students for deficiencies created by the dual school system."

Id. at 407.

Consequently, the Circuit Court upheld the trial court's ruling that the test not be used for four years, except for remedial purposes, and remanded the case to consider the impact of the past discrimination. Id.

b. Four years later, the Eleventh Circuit agreed with the District Court in determining that vestiges of past discrimination did not account for the disparate impact on blacks based on expert testimony that there was no causal link between past discrimination and the current disproportionate impact the test had on blacks. Debra P v. Turlington, 730 F.2d 1405, 1414-15 (11th Cir. 1984). Additionally, the court "affirm[ed] the finding that use of the SSAR-II [literacy test] as a diploma sanction will help remedy past discrimination." Id. at 1416.

c. Another court recently considered the validity of a Texas graduation test and held, even though there was evidence that Texas minority students have been and continue to be subject to "educational inequality," that the TAAS test was valid. "However, the Plaintiffs presented insufficient evidence to support a finding that minority students do not have a reasonable opportunity to learn the material covered on the TAAS examination, whether because of unequal education in the past or the current residual effects of an unequal system....the Court finds that all Texas students have an equal opportunity to learn the items present on the TAAS test, which is the issue before the Court. In fact, the evidence showed that the immediate effect of poor performance on the TAAS examination is more concentrated, targeted educational opportunities in the form of remediation." G. I. Forum, supra at 674.

d. The courts have rejected arguments that graduation examinations violate the Equal Protection Clause because they only apply to students enrolled in the public schools. See Rankins v. Louisiana State Board of Elementary and Secondary Education, supra; Debra P. v. Turlington, supra.

2. Due Process

The courts have determined that students have a property right in a high school diploma. Debra P, 644 F.2d at 404. "It is clear that in establishing a system of free public education and in making school attendance mandatory, the state has created an expectation in the students. From the students' point of view, the expectation is that if a student attends school during those required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used constitutionally." Id. at 403-4. Accordingly, this right cannot be deprived without due process of law. See also, GI Forum, supra.

a. Notice Requirement

Adequate notice must be given to students that passing a particular test is a prerequisite to graduation. Debra P, 644 F.2d at 404. This notice is required so that students will have the opportunity to prepare for the test, the school district will have the time to prepare a remedial program, and there is time to set an appropriate passing score. Id.; See also, Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 186 (7th Cir. 1983); Crump v. Gilmer Indep. School Dist., 797 F. Supp. 552 (E.D. Tex 1992); Meghan Rene, et al. v. Reed, (Indiana Superior Court, County of Marion, May 28, 2000).

(1) In Debra P, the state's own task force found that "[a]t the eleventh hour and with virtually no warning, these students were told that the requirements for graduation

had changed. They were suddenly required to pass a test constructed under the pressure of time and covering content that was presumed to be elementary but that their schools may or may not have taught them recently, well, or perhaps at all." 644 F.2d at 404. Here, thirteen months was not considered adequate notice. Id.

(2) See also, Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981). Two years was considered adequate notice for the implementation of a diploma sanction particularly due to the fact that remedial courses were provided. Id. at 506.

(3) Crump v. Gilmer Indep. Sch. Dist., 797 F. Supp. 552 (E.D. Tex 1992). In light of the decision in Debra P, the court reasoned that a one year notice that passing the Texas Assessment Skills Examination (TASSE) was a prerequisite to graduation was insufficient, despite the fact that there had been a minimum competency examination prerequisite since 1984.

(4) Williams v. Austin Indep. School Dist., 796 F. Supp. 251 (W.D. Tex. 1992). The court reasoned that the seven year notice that Texas students had that they must pass a comprehensive examination before receiving a diploma was adequate though the specific test, the TASSE, had been implemented only a year before. Id. at 253-54. Debra P was distinguished and use of the TASSE was not enjoined Id. at 256.

b. Fundamental Fairness

(1) Test validity is the second due process concern. Debra P. In Debra P, the court determined that if the "exit exam" covered materials not taught in school, it would be fundamentally unfair and would be a violation of due process and equal protection. Id. at 406.

"In the field of competency testing, an important component of content validity is curricular validity, defined by defendant's expert Dr. Foster as 'things that are currently taught.'" Id. at 405.

Both the required material that should have been taught to students and the actual material which is taught to students regardless of whether it should have been taught must adequately correspond to the test for it to have "curricular validity." Crump, 797 F. Supp. at 555.

3. The GI Forum Decision

   (a) "ACCORDINGLY, the Court finds that the TAAS exit-level examination does not violate regulations enacted pursuant to Title VI of the Civil Rights Act of 1964. While the TAAS test does adversely affect minority students in significant numbers, the TEA has demonstrated an educational necessity for the test, and the Plaintiffs have failed to identify equally effective alternatives. In addition, the Court concludes that the TAAS test violates neither the procedural nor the substantive due process rights of the Plaintiffs. The TEA has provided adequate notice of the consequences of the exam and has ensured that the exam is strongly correlated to material actually taught in the classroom. In addition, the test is valid and in keeping with current educational norms. Finally, the test does not perpetuate prior educational discrimination or unfairly hold Texas minority students accountable for the failures of the State's educational system. Instead, the test seeks to identify inequities and to address them. It is not for this Court to determine whether Texas has chosen the best of all possible means for achieving these goals. The system is not perfect, but the Court cannot say that it is unconstitutional." GI Forum v. Texas Education Agency, 87 F. Supp. 2d 667 (W.D. Tx. 2000).

F. High Stakes Testing and Retention

1. Courts have not found a constitutional right to a promotion. See Erik V. v. Causby, 977 F. Supp. 384 (E.D. N.C. 1997). In ruling on a preliminary injunction sought against a school district for a retention policy based on standardized test scores, the court in Erik V. applied the "rational basis" test. Id. at 389. It determined that a classification based on "qualitative achievement standards" was rationally related to the permissible governmental end of encouraging academic achievement. Id. Additionally, the court recognized traditional notions of federalism wherein public education is largely left in the hands of state and local authorities. Id. at 390.

2. See also, Sandlin v., Johnson, 643 F.2d 1027 (4th Cir. 1981).

Under "rational basis" review, classifying students for promotion on the basis of a reading level determined by the Ginn Reading Series was rationally related to permissible governmental end of furthering education and preparation for life. Id. at 1029. "Decisions by educational authorities which turn on evaluation of the academic performance of a student as it relates to promotion are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context." Id.

II. Testing Disabled Students

A. Per IDEA 1997 and the 1999 Department of Education Federal Regulations, students with disabilities are to be included in state and district-wide assessments.

1. IDEA 1997 [20 U.S.C. §1412 (a) (17)]

Participation in assessments.
(A) In General - Children with disabilities are included in general state and district-wide assessment programs, with appropriate accommodations, where necessary. As appropriate, the state or local educational agency --
(i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in state and district wide assessment programs; and
(ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments.

2. IDEA 1997 [20 U.S.C. §1414(d)(1)(A)(v)]

(v)(I) a statement of any individual modification in the administration of state or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment; and

(II) if the IEP Team determines that the child will not participate in a particular state or districtwide assessment of student achievement (or part of such an assessment), a statement of --

(aa) why that assessment is not appropriate for the child; and

(bb) how the child will be assessed.

3. Department of Education Regulations [34 C.F.R. §300.138]

   Participation in assessments.
   The state must have on file with the Secretary information to demonstrate that -
   (a) Children with disabilities are included in general state and district wide assessment programs, with appropriate accommodations and modifications in administration, if necessary.
   (b) As appropriate, the state or LEA--
   (1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in state and district-wide assessment programs;
   (2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and
   (3) Beginning not later than July 1, 2000, conducts the alternate assessments described in paragraph (b)(2).

4. Joint Policy Memorandum on Assessments from the Office of Special Education and Rehabilitative Services and the Office for Civil Rights, 27 IDELR 138 (Sept. 29, 1997).

   a. Exclusion of students with disabilities from assessments violates Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act; and the IDEA 1997.

   b. "IDEA 1997 expressly requires the inclusion of students with disabilities in both state and district-wide testing." 27 IDELR 138.

   c. Accommodations must be provided for those students with disabilities who require accommodations in order to participate and such accommodations should be listed in the student's IEP or Section 504 plan.

   d. Not all students with disabilities must participate in the assessments.

      (1) Decisions not to include a student with a disability must be made by each individual student's IEP team.

      (2) The IEP must include a statement of why a student will not participate.

      (3) The IEP must indicate alternative assessment methods for a student unable to participate in assessments.

e. Alternate assessment programs for students with disabilities who are unable to participate in state and district-wide testing must be developed and begin to be implemented by July 1, 2000, per IDEA 1997.

B. The requirement that a student with a disability pass an achievement test in order to qualify for a diploma is not discriminatory. See Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179 (7th Cir. 1983).

In 1983, the "Minimal Competency Test" (MCT) which was required for receipt of a diploma was challenged by disabled elementary and secondary students in Brookhart, 697 F.2d 179 (7th Cir. 1983). The court determined that the school district had the authority to establish minimum standards for the receipt of a diploma and that such a requirement did not violate § 504 of the Rehabilitation Act of 1973 nor the IDEA. Id..

1. "Denial of diplomas to handicapped children who have been receiving special education and related services required by the Act, but are unable to achieve the educational level necessary to pass the M.C.T., is not a denial of a 'free appropriate public education.'" Id. at 183.

2. "Altering the content of the M.C.T. to accommodate an individual's inability to learn the tested material because of his handicap would be a 'substantial modification' as well as a 'perversion' of the diploma requirement. *** A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap. Thus the denial of a diploma because of inability to pass the M.C.T. is not discrimination under the [Rehabilitation Act]." Id. at 184.

C. In addition to the legal issues that arise with regard to all "high stakes" testing discussed above, special issues arise when "high stakes" minimum competency tests are required of students with disabilities. See Brookhart, 697 F.2d 179 (7th Cir. 1983).

1. Due Process - Notice and the IEP

a. In Brookhart, the court found that a year to a year and a half was not adequate notice of the test requirement. Id. at 187. Specifically, this amount of time was inadequate in which to reevaluate and possibly modify IEPs. Id.

"[P]arents had only a year to a year and a half to evaluate properly their children's abilities and redirect their educational goals. We agree with the parents and the State Board that this was insufficient time to make an informed decision about inclusion or exclusion of training on M.C.T. [Minimum Competency Test] objectives." Id.

"Though we are unable on this record to define 'adequate notice' in terms of a specified number of years, the School District can be assured that the requirement would be satisfied if one of the following two conditions for adequate notice is met. The School District can, first ensure that handicapped students are sufficiently exposed to the material that appears on the M.C.T., or second, they can produce evidence of a reasoned and well-informed decision by the parents and teachers involved that . . . a student will be better off concentrating on educational objectives other than preparation for the M.C.T." Id. at 187-88.

Hence, goals pursuant to the passing of a minimum competency test must be incorporated into a student's IEP within a sufficient amount of time to allow for adequate notice. Id.

b. See also, Board of Educ. v. Ambach, 90 A.D.2d 227 (N.Y. App. Div. 1982).

Three years' notice was considered adequate as it allowed for time to adjust IEPs to enable students to pass the test required for the diplomas. Id. at 239.

2. Test Validity

As noted earlier, "high stakes" tests must have "curricular validity" in order to meet due process requirements. See Debra P, 644 F.2d 397, 402 (5th Cir. 1981). Only students with disabilities who are instructed in the "general curriculum" or otherwise receive the appropriate material would be eligible to take these tests. As such, a student not instructed in the "general curriculum," as per IDEA 1997, would not be prepared to take the test and should not be tested.

Accordingly, a test does not have to be validated separately for the learning disabled. See State Dept. of Educ.(Ga), EHLR 352:480 (OCR 1987). In a Georgia case, the OCR found that Section 504 did not require an adaptation of a state-wide test required for graduation. Id. To the contrary, both IDEA 1997 and Section 504 require that tests be validated for the purpose for which they are used. See 20 U.S.C. §1412(b)(3)(B)(i); 34 C.F.R. §104.35 (b)(1).

3. Accommodations and modifications

a. IDEA 1997, Section 504 and the Department of Education Federal Regulations all state that accommodations may be necessary for a student with a disability to participate in any standardized testing.

Section 504 of the Rehabilitation Act of 1973, 34 C.F.R. §104.4 (2) Discrimination Prohibited (b)(2) [A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

See also, 20 U.S.C. §1412 (a) (17); 34 C.F.R. §300.138 (quoted in full above).

b. Accommodations are to provide access to tests not to guarantee results. Accordingly, altering the content of a test as a means of accommodating a disability is not required. See Brookhart, 697 F.2d at 184. "A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap." Id.

c. Accommodations must be reasonable accommodations

(1) Nevada State Dept. of Education, 25 IDELR 752 (OCR 1996).

Ban on the use of calculators in the math portion of a proficiency exam was upheld by the OCR. The OCR upheld the SEA's determination that computational skills were an essential part of the state's educational program, thus such an accommodation would be a significant alteration of the program which would not be reasonable. Most notably, the OCR specifically noted the other accommodations which were made available to students.

(2) Florida State Dept. of Educ., 28 IDELR 1002 (OCR 1998).

State guidelines regarding permissible accommodations for a high school competency test were upheld despite a school district's policy of permitting the same or nearly the same accommodations a student uses in his classes. State guidelines prohibited reading or explaining of the communications portion of an exam to a student as if such an accommodation would invalidate the test. No violation of either Section 504 or the ADA was found when a student who was allowed such accommodations in other test situations was not allowed the accommodation for the competency exam.

See also, Alabama Dept. of Educ., 29 IDELR 249 (OCR, 1998).

OCR upheld the State's policy of denying use of reading devices on Alabama High School Exit Exam because it would invalidate the test.

(3) Georgia Department of Education, 27 IDELR 1072 (OCR 1997).

Student was not eligible for a regular diploma because he could not pass the Georgia high school graduation test in the area of writing. The State was within its rights to refuse modifications consisting of a spell checker, dictated sentences or a mapping technique.

(4) Mobile County Bd. of Educ., 26 IDELR 695 (AL 1997).

In administering the Alabama High School Exit Exam, a student is allowed to use accommodations (that do not invalidate the assessment) that are a part of his or her instructional program. SEA upheld district's policy and the denial of an accommodation to a student which was not part of his instructional program.

(5) Virginia Department of Education, 27 IDELR 1148 (OCR 1997).

Student was not entitled to have the reading section of a statewide assessment read to him as this was an impermissible test modification. This result was upheld even though the student's IEP permitted him to have written material read to him.

d. Determination of accommodations must be made on individualized basis

Hawaii State Dept. of Educ., 17 EHLR 360 (OCR 1990).

The state's blanket policy of only providing "readers" to visually impaired students was a procedural violation of Section 504. Section 504 requires individual determinations of a student's educational needs. Denial of a reader for an examination required for the receipt of a diploma to other handicapped students who may have needed such an accommodation denied them an equal opportunity to receive the diploma which violated Section 504.

e. Extensive modifications are not required

Hearing impaired applicant to nursing program at a community college was properly denied admission. "It is undisputed that respondent could not participate in Southeastern's nursing program unless the standards were substantially lowered. Section 504 imposes no requirements upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." Southeastern Community College v. Davis, 442 U.S. 397, 413 (1978); see also Alexander G. Choate, 469 U.S. 287 (1985).

D. Alternate Assessments

As noted above, alternate assessment procedures for students not able to participate in testing must be developed per IDEA 1997 and the Department of Education's Federal Regulations. See 20 U.S.C. § 1412 (a) (17); 34 C.F.R. § 300.138.

Alternate assessment determinations are to be made by the IEP team (as well as determinations about accommodations noted above). See 20 U.S.C.

§1414(d)(1)(A)(III)(v)(I) and (II); 34 C.F.R. §300.347 (a)(5)(i)-(ii). This includes determinations of whether and why to assess a child by alternate means and how the student will be assessed. Id. These determinations are to be found in the student's IEP. Id.

III. Students with Limited English Proficiency

A. Limited English proficient (LEP) students also require special considerations regarding their participation in high stakes tests. It has been found to be permissible to hold these students accountable for an acceptable level of language competency. To be equitable and legal in imposing a language competency requirement, the LEP students must be taught the necessary skills so that they may pass the tests. At least one court has recognized that LEP students can be required to meet proficiency standards in language.

1. " At stake here are the educational policies of an entire state, matters traditionally, in our federal system, viewed as primarily state concerns. The issue is essentially a pedagogic one: how best to teach comprehension of a language. Neither we nor the trial court possess special competence in such matters. It follows that on such thin ice both tribunals should tread warily, doing no more than correcting clear inequities and leaving positive programming to those more expert in educational matters than are we."

   United States of America v. State of Texas, 680 F.2d 356, 370 (5th Cir. 1982).

B. If testing of language skills is a requirement, then LEP students must be taught the necessary skills. See Lau v. Nichols, 414 U.S. 563, 567 (1974). In Lau, there were 2,856 students of Chinese ancestry in the school district who did not speak English. Only 1000 were given supplemental instruction in English. The education code required that no diploma be awarded until the student met proficiency standards in English as well as other subjects. The Supreme Court held that the failure to teach English sufficiently to all students denied the students a meaningful opportunity to participate in the educational program.

> "Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, text books, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Id. at 566.

C. LEP and the IDEA

1. Special provisions are made for LEP students in the IDEA. The IDEA recognizes that LEP students are a fast growing population in the schools and may be over-represented in the population of disabled students.

> "The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation. In the Nation's 2 largest school districts, limited English proficient students make up almost half of all students initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds."
>
> 20 U.S.C. § 1400(c)(7)(F).

2. LEP students may not be identified as disabled if it is shown that "... the dominant factor for such determination is ... limited English proficiency." 20 U.S.C. § 1414(a)(5). Having limited English proficiency is not a disability.

3. Testing under the IDEA must be administered in the "child's native language..." 34 C.F.R. § 300.532(a)(1)(ii). The evaluation procedures utilized must assess whether the child has a disability and the nature of the disability rather than the child's English language deficiencies. See San Luis Valley (CO) Board of Cooperative Services, 21 IDELR 304 (OCR 1994). Furthermore, "[m]aterials and procedures used to assess a child with limited English proficiency [must be] selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills." 34 C.F.R. § 300.532(a)(2).

4. One way to rule out any difficulties arising from limited English proficiency is to administer a language proficiency test. If the child is found to be proficient in English, then the child may be tested with English language

instruments. If not, then assessments must be administered in the child's primary language. See San Diego (CA) Unified School District, 31 IDELR 40 (OCR 1999). Also, if a language other than English is spoken in the home, this fact will not automatically require that the student be tested in that language of the home. The language to be used for assessment will depend on the student's proficiency level. Id.

5. The IEP committee is also directed to, "in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP." 20 U.S.C. § 1414d(3)(B)(ii); 34 C.F.R. § 300.346(a)(2)(i). The IEP committee must specify if language services are needed due to LEP. There is no right to limit services to a choice of special education services or LEP services. A student may be entitled to both types of services. See San Luis Valley (CO) Board of Cooperative Services, supra.

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The Long Arm of School District Authority: When Can Employees Be Disciplined for Off-Campus Actions?

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INTRODUCTION

Increasingly, school officials are concerned about the behavior, habits, activities and beliefs of employees during non-work time – particularly when an individual's proclivities don't fall within the parameters of generally accepted "norms".

This is not new, but rather represents a swing of the pendulum back in the direction of wanting to control what occurs off-campus during an employee's personal time. That seemingly simple desire, though, raises concerns about privacy, due process and other concerns.

Generally, the kinds of things that give school officials angst about an employee fall into three categories: Sex, drugs and criminality. I will start with some general principles of what steps school districts should follow in seeking to discipline or dismiss an employee for an event or events that happen elsewhere. This rendition does not consider pre- or post-employment conduct, but rather relates to incidents that occur while a person is on the school payroll.

BACKGROUND

Arrows in a School Official's Quiver

School officials seeking to discipline a public school teacher for an off-campus infraction have essentially three main tools at their disposal:

- ***Reprimand/Warning***. This is perhaps the mildest form of rebuke, and consists of written documentation of the misconduct. At the district's option, the narrative may be placed in an employee's personnel file as part of the permanent record. Reprimands and warnings often include a directive that the employee misconduct must not be repeated, or more severe disciplinary measures will be deployed.

- ***Suspension***. This is a popular device because school authorities can temporarily remove a professional employee from performing his or her duties for a limited time period. Suspension also serves the purpose of protecting children by removing the employee from a potentially compromising environment while an investigation is under way. Suspensions may occur with or without pay.

- ***Dismissal.*** In this case, the school district moves with dispatch to terminate the employee for a specified cause. When, for example, a teacher has tenure or a related form of right giving the teacher a property interest in his or her employment, the employee has the right to due process under the U.S. Constitution. Often, less extensive process is guaranteed under the Fourteenth Amendment for the lesser penalties stated above.

For all three categories it is incumbent upon school officials to follow a two-step process that will bolster their case should the decision be challenged.

1) There must be proof of misconduct; and

2) The misconduct must have a nexus to the school district -- and preferably to direct instruction and learning -- in the classroom. Without this connection, there may be an unwarranted intrusion into an employee's private life.

A nexus between the misconduct and the employee's ability to perform her or his duties exists when the behavior negatively affects the health, safety, welfare or education of students. Hence, analyzing the facts can help determine whether the behavior makes a teacher an inappropriate role model for students, even if the misconduct, at first blush, seems wholly unrelated to the work environment

The National School Boards Association's *A School Law Primer: Part I, Teacher Discipline: Legal Pointers for Public Schools* (April 1999, Updated September 2000) contains a helpful recitation of investigative techniques necessary to support a charge of misconduct. The publication notes that a solid investigatory record can be the foundation for justifying disciplinary action imposed by the district.

Supporting a Charge of Misconduct-Good Investigation. A legally sound dismissal for misconduct relies heavily upon a thorough and prompt investigation. Listed below are some key components of an effective investigation. Following them will help obtain the evidence necessary to support a school district's attempt to dismiss a teacher for misconduct. While conducting an effective investigation is absolutely critical, school districts must also consider employee privacy rights/concerns, employer privacy obligations, statutory restrictions on certain investigation techniques such as polygraphs and surveillance, and liability for defamation, false imprisonment, infliction of emotional harm, and other torts.

1. Determine whether an investigation is necessary. If so, give careful consideration to its nature and scope and who should conduct it.

2. Perform the investigation according to school board policy. Set priorities and establish a sequence of activities as part of an investigation plan.

3. Consider the following:

Interview those persons first who may not be available later, whose willingness to cooperate may diminish, or whose accurate recollection must be preserved; observe, photograph, and/or take control over things and locations which may not be available later or which may change; interview persons next who are perceived to have the most extensive or fundamental information (e.g., the complainant); interview those with less extensive information which is relevant but not critical; interview hostile witnesses near the end of the process.

4. With each witness, ask questions working from the general to the specific. Take careful notes and record the conversations.

5. Allow each witness to give vague, gossipy information; take it for what it is worth, but pin down what the person has actual knowledge about. Gather as much information as possible. Get specific, such as exact conduct or words spoken.

6. Avoid leading questions that may lead to inaccurate information and result in charges of bias.

7. Do not accept anyone's version of the facts at face value.

8. Look for objective or written confirmation, such as expense records, telephone records and time sheets. Create a timeline charting verbal accounts with the corroborating physical evidence.

9. Ask for names of other witnesses or persons with knowledge and interview everyone. Accept nothing less than full cooperation from employee witnesses.

10. Attempt to interview the accused early on so that information divulged in the interview can be used in interviewing others. Consider interviewing the accused a second time to get a response to subsequent allegations.

11. Repeat interviews if necessary. Compare one witness's statement with another's and probe inconsistencies.

12. If there is a risk of retaliation from a supervisor or if the witness or victim fears intimidation, protect and assist those interviewed. (Do not promise absolute confidentiality.)

13. Try to conduct interviews in an unobtrusive, inconspicuous way. Try to avoid being confrontational.

14. If the conduct involves assault or touching, consider suspension or separation of the accused during the investigation.

15. Think hard before agreeing not to investigate or take other action at the request of the victim. Consider the school district's needs and liabilities as well. Confirm such requests in writing.

16. Consider the use of trained professionals to conduct interviews with children when allegations involve sexual abuse.

17. Document EVERYTHING, even if the investigation is inconclusive. Additional evidence may surface later that will allow the investigation to be re-opened.

FOUNDATIONS FOR OFF-CAMPUS EMPLOYEE DISCIPLINE

Teachers are Role Models and Thus Can Be Held to a Higher Standard

It is both common parlance and legally recognized that teachers – perhaps moreso than other employees – hold an important spot as role models within the school district. It is that special status and visibility that gives school districts the most angst when teachers misbehave, but also provides the leverage for taking action.

In *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S.Ct. 1589, 1595 (1979), the U.S. Supreme Court opined that "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values." The outcome of that statement leads to the conclusion that teachers are "held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students." *Board of Education of Hopkins County v.* Woods, 717 S.W.2d 837 (Ky. 1986).

That higher expectation reared again recently in a case in which the 6th circuit court of appeals upheld an on-campus random drug testing policy required of Knoxville, Tenn. Teachers. *Knox County Educ. Assn v. Knox County Bd. of Educ.*, 158 F.3d 361 (6 1h Cir. 1998). The court found that the policy withstood a Fourth Amendment challenge in part because teachers are in "safety sensitive positions."

But it also emphasized that, "Indeed, teachers occupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad. Teachers and administrators are not simply role models for children (although we would certainly hope they would be that). Through their own conduct and daily direct interaction with children, they influence and mold the perceptions, and thoughts and values of children." *Knox,* 158 F.3d at 375.

Naturally, such a drug testing policy would not only capture drug use by teachers that occurs on campus and during the course of the school day, but would also detect residual traces of illegal substances that might have been used during non-working hours.

Sex

Americans are still skittish when it comes to sex, and that discomfort is illustrated in the temptation to act on behavior that seems outside the generally accepted norm of heterosexual, monogamous, preferably within-marriage liaisons.

School districts, then, have found themselves seeking to discipline employees for sexual relations outside of marriage, pregnancy outside of marriage, homosexuality and a host of other situations that happen outside of view.

The basic questions, although intimate and sometimes graphic in nature, remain the same - is there proof of the alleged misbehavior and is there a nexus to the employee's job, either because of community reaction, student reaction, diminished esteem among peers or other sorts of tangible effects.

One recent example of a community acting on sexual mores occurred in Broward County, Florida, where two teachers were found at a sex club during a police raid. Both teachers were engaged in a sexual act - not with each other - when arrests were made. Tonya Whyte, a 9th-grade math teacher at Deerfield Beach High School just north of Fort Lauderdale, was suspended for two weeks for her participation in the club – which sold memberships for $100 a year.

Ms. Whyte and her fiancee were paying their first visit to the Athena's Forum, where dinner and dancing occurred, but which also featured such unusual items as mattresses along the floor, hot tubs and sex toys for sale. Complicating matters, Ms. Whyte was unrepentant, she said "I don't feel I did anything wrong." The facts are in dispute. The 34-year-old Ms. Whyte said she and her boyfriend were dancing and that she was fully clothed. Police say she was standing with her legs spread over him, that he was fondling her and that this was all happening in full view of other patrons.

The school board argued that its 8-1 vote for suspension was motivated by the fact that teachers are held to a higher standard. Then-Chairwoman Darla Carter said, "You work for us, you work for our children, you work for the parents of this county and this community and you would have a higher standard for what you do." Carter called Ms. Whyte's behavior a violation of the school's ethical code that teachers sign, and which requires teachers to use their best professional judgement and have integrity. It forbids "conduct inconsistent with the standards of public conscience and good morals."

In the midst of the furor and with criminal charges of lewd and lascivious conduct pending, she resigned her job as a teacher one month after the incident, depriving the story of a neat and tidy ending.

Also caught in the police sting was Kenneth Springer, a 48-year-old geography teacher who police say was on a bed performing oral sex on his wife in full view of other patrons in the orgy room. Springer – who said it was his first time there – was once named teacher of the month, taught honors classes and received outstanding performance evaluations. Though criminal charges were lodged, unlike with Whyte, prosecutors eventually dropped the charges.

As part of a settlement, the board voted to revoke Springer's tenure, place him on probation and appoint him to a position as an adult-education teacher for inmates at the Broward County Jail, a post that will pay less than his former salary as a traditional classroom teacher. The board left open the option that Springer could reapply for his job as a high school teacher in two years.

For more, *see infra*.

Essentially it comes down to a privacy right. The key question being where does the right of the employee, independent of that status, have a right to pursue interests and activities that might be seen as detrimental to the school environment if revealed. Can that conduct, once it is known, be the sole reason for dismissal or discipline and how much of a role does notoriety play in the equation. It is the kind of difficult balance that school district will continually be forced to strike on a case-by-case basis as new scenarios arise.

As a final caveat, it might pay to check state law and to determine whether there are any parameters on this subject. State statutes sometimes address the topic and circumscribe what school boards can do. For example in New York State, the legislature in 1993 defined some protected activities. It makes it unlawful for a school district to discipline employees based on certain lawful, off-duty conduct:

1. Use of consumable products (such as cigarettes)
2. Recreational Activities (such as bungee jumping, extreme fighting, or other games, sports or hobbies).
3. Certain Political Activities, or
4. Union activities.

The measure contains some "safe harbors" that allow an employer to take action based on violations of the Code of Ethics, based on a district's substance abuse policy, and other circumstances.

The remainder of this outline is excerpted from David M. Feldman and Debra Moritz Esterak of Feldman & Rogers, L.L.P. in Houston, Texas. Feldman presented the material as part of his presentation for the COSA Advocacy Seminar in San Antonio, Texas. His presentation was titled "Employee Misconduct: Regulating Misconduct Occurring Before and After the Job Offer is Made."

4. **Examples of Defamation Claims in the School Context**

a. **School is not bound by written recommendation when giving oral reference.** An elementary school teacher brought an action against her former principal claiming that she "willfully and wantonly" defamed teacher to prospective employers. The teacher applied for a position with another school district, but received a poor oral recommendation from the former principal. The court concluded this was not defamatory even though teacher had previously received a good written evaluation. Earlier acts of support do not warrant a inference of defamation action upon occasion of a later, unfavorable comment. *Zerr v. Johnson,* 894 F. Supp. 372 (D. Colo 1995).

b. **Requisite malice must be shown to overcome qualified privilege.** Teacher sued school district and school administrator for allegedly defamatory statements included in a letter written by administrator to prospective employers regarding teacher's qualifications. The letter included statements that teacher was "cold and distant" and that her peer relationships were "only fair." The court found the latter insufficient evidence that the school district or the administrator acted with the requisite malice, or lack of reasonable belief in statements' truth, to overcome the qualified privilege barring liability for defamation. Teacher needed to produce further evidence to overcome the qualified immunity privilege held by school district and administrator. *Manjuso v. Oceanside Unified Sch. Dist.*, 200 Cal. Rptr. 535 (Cal. App. 4 Dist. 1984).

E. **Pre-Employment Drug and Alcohol Testing** — The Fourth Amendment guarantees a person's right to be free from unreasonable searches and seizures. Courts have recognized that denial of future employment is not as intrusive as the loss of an existing job. "No one is compelled to seek a job . . . if individuals view drug testing as an indignity to be avoided, they need only refrain from applying." *Willner v. Thornburgh*, 928 F.2d 1185, 1190 (D.C. Cir. 1991). Nonetheless, school districts that attempt to drug and alcohol test "all applicants" or "all employees" rather than those applying for safety-sensitive positions and/or positions subject to Department of Transportation regulations may face constitutional challenge. A Georgia statute requiring all applicants for state employment to undergo drug testing was successfully challenged by a state teacher's organization. The court found the requirement unreasonable, as no "governmental interest that is sufficiently compelling to justify testing *all* applicants" was identified. *Georgia Assoc. of Educators v. Harrie*, 749 F. Supp. 1110, 1114 (N.D. Ga. 1990) (emphasis in original). A generalized interest in maintaining a drug-free workplace was deemed an insufficient basis for testing all applicants.

GENERAL GUIDELINES FOR ADDRESSING EMPLOYEE MISCONDUCT NOT INVOLVING PERFORMANCE ISSUES

Contract employees have a protected interest in employment once they are hired. Ending that employment relationship based on cause is often a difficult task, as what constitutes "good" or "just" cause for termination is sometimes difficult to determine. This determination becomes even more complicated when the misconduct occurs off-campus or is otherwise not school-related. The remainder of this discussion will focus on what types of conduct, other than sexual abuse or harassment of students or employees, rise to the level of terminable offenses.

A. **Teachers Are Role Models and May be Terminated for Misconduct that is Not Performance-Related** — Ordinarily, what individuals do in their personal or private time is not subject to scrutiny by their employers. However, "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values." *Ambach v. Norwick*, 441 U.S. 68, 77, 99 S.Ct. 1589, 1595 (1979). As a result, teachers are "held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students." *Board of Education of Hopkins County v. Woods*, 717 S.W.2d 837 (Ky. 1986).

1. **Vagueness Challenges to Terminations Based on "Immorality"** — A common challenge to termination or certificate revocation based on "immorality" is that the term is unconstitutionally vague. Courts have consistently rejected this argument as long as the alleged misconduct is tied to the teacher's fitness to teach. *See Alford v. Ingram*, 931 F.Supp. 768 [111 Ed. Law Rpt. [793]] (M.D. Ala. 1996) (state law

allowing for revocation of teaching certificate for immorality upheld). *Compare Burton v. Cascade School Dist. Union High School No. 5*, 353 F.Supp. 254 (D.C. Or. 1973) (minority view that statute allowing for dismissal of teachers on the grounds of immorality is unconstitutionally vague).

2. **Conduct Must Fall under Policy or Statute** — Statutes and district policies establish the reasons permitting adverse action on a contract. Before terminating, suspending, or nonrenewing an employee, districts should ensure that the reason for taking such action is permitted by policy or statute.

3. **Prohibited Conduct Must Bear a Relationship or "Nexus" to Fitness to Teach** — A school board is not empowered to take adverse action on an employee's contract simply because the employee's personal or private conduct incurred the board's displeasure. *Board of Regents v. Martine*, 607 S.W.2d 638 (Tex.Civ.App.—Austin, 1980). *See also Stoddard v. School District No. 1,* 590 F.2d 829 (10th Cir. 1979) (school district cannot nonrenew a teacher for reasons such as obesity, failure to attend church, living in a trailer park, or playing cards). Instead, the board must "establish a sufficient nexus between such conduct and the board's legitimate interest in protecting the school community from harm." *Lile v. Hancock Place School District*, 701 S.W.2d 500 (Mo.App. 1985).

   a. **Establishing a nexus** — Recently, courts tend to find a nexus only if:

      - the conduct involved a student or a school-aged individual;
      - the act was widely publicized;
      - the event took place in public, thereby negating the actor's right to privacy; or
      - the conduct was the result of a larger, irremediable problem or condition.

SEXUAL MISCONDUCT ISSUES

Although the times are changing and practices which were once considered shocking are now common, school boards may regulate certain types of sexual behavior that rises to the level of immoral conduct. There is little, if any, doubt that off-campus sexual misconduct with a student is grounds for dismissal based on immorality. "'By virtue of the nature of the offense—sexual intercourse with a minor student of the district—it may be considered doubtful whether such conduct could ever be too remote in time'" (emphasis in original). *Toney v. Fairbanks North Star Borough School District*, 881 P.2d 1112, 95 Ed. Law Rptr. 380 (Alaska 1994). The question that often arises, however, is when can an employee be dismissed for sexual misconduct that does not involve a student?

A. Criminal Sexual Behavior

1. **Sex Crimes Involving Children** — Conviction of a sex crime with a child (indecency with a child, indecent exposure, rape, etc.) renders the teacher unworthy to instruct, and dismissal and revocation of the teacher's certificate is warranted. The conviction does not have to take place during the teacher's employment. For example, a teacher's conviction for indecent exposure that took place prior to his employment made him unsuitable for service as a teacher and coach in the school system. Thus, the district had good cause to terminate teacher during the school year. *C.F.S. v. Mahan,* 934 S.W.2d 615 (Mo. App. E.D. 1996).

2. **Conviction Is Not Required if Evidence Supports Allegations** — Actual conviction of a sex crime is not necessary in order to act upon the teacher's contract as long as the allegations are supported by the evidence and a sufficient nexus is shown.

a. **District can rely upon statements given to the police.** While a criminal charge was pending, the board held a hearing to terminate a teacher for taking indecent and immoral liberties with at least five young boys. The teacher sought to postpone the hearing until after the trial so his testimony before the board would not be used in the criminal proceeding. The board refused and conducted the hearing where it was revealed that the teacher had given the police a voluntary statement admitting his guilt. After he was terminated, the teacher appealed, claiming his rights had been infringed by the board's allowing the hearing to proceed before the criminal charges were resolved. Due to the nature of the charges and the overriding public interest in resolving the issue, the court found no deprivation of the teacher's due process rights. *Lang v. Lee*, 639 S.W.2d 111 (Mo.App. 1982).

b. **Publicity of allegations is a consideration.** While living with his girlfriend and her two daughters, a teacher frequently walked around the house naked, took baths with the girls, and had them sleep in his bed when their mother was in the hospital. The girls' father filed sexual abuse charges against him which soon appeared in the local newspapers. The board terminated the teacher for immoral conduct. On appeal, the court affirmed the termination since the findings were supported by substantial evidence and the teacher's conduct directly affected the school community. *Lile v. Hancock Place School District*, 701 S.W.2d 500 (Mo. App. 1985).

c. **Evidence of abuse, not simply allegations, is essential.** School board did not have just cause to terminate teacher where no proof was offered to substantiate allegations that teacher engaged in sexual misconduct with his daughter. In order to demonstrate just cause for termination, the law requires that a board must prove by a preponderance of the evidence that allegations of sexual misconduct are true, not merely that allegations were made. *Sublett v. Sumter County Sch. Bd.*, 664 S.2d 1178 (Fla. App. 5 Dist. 1995).

3. **Effect of an Appeal —** The pendency of an appeal does not affect the finality of the conviction or the presumption of guilt. If the conviction is overturned, however, the district may be required to take additional steps. For example, a teacher convicted of oral copulation of a disabled person (who, incidentally, was one of his pupils) was summarily terminated as a result of the conviction. Eventually, the conviction was overturned on procedural error. He requested that the district reinstate him, but was denied. In an action to set aside his termination and reinstate him with back pay, the court determined that his summary dismissal was valid while the conviction stood, its validity depended on the supporting conviction. Upon dismissal of the charges, the teacher became eligible once again for continued employment and, therefore, was entitled to the protections of dismissal for cause proceedings. Accordingly, the court required the district to conduct a hearing to determine whether cause existed to support the dismissal.

B. **Adultery** — Although the constitutional right to privacy protects sexual relations within a marriage, no such right exists to protect the same conduct outside of marriage. Thus, dismissal or demotion for adultery may be permissible if that conduct impacted the employee's ability to perform his or her job.

1. **Action permissible if affair impacts job performance.** A registrar's demotion for engaging in an affair with another employee was upheld since the affair was known to others and his ability to perform his job was impaired. *Johnson v. San Jacinto*, 498 F.Supp.555 (S.D.Tex.—Houston 1980).

2. **Engaging in affair during work hours is definitely good cause.** Similarly, an assistant superintendent was dismissed on grounds of immoral conduct and neglect of duty as a result of an affair. The evidence was clearly sufficient to uphold the board's decision, revealing that the administrator left his office three to four times a week during working hours to meet his lover; he borrowed a teacher's apartment for these soirees; he sent nude photos of his lover to her husband; and he would skip conventions in order to spent time with his mistress. *Sedule v. Capital School District*, 425 F.Supp 552 (D.Del. 1976); *aff'd* 565 F.2d 153; *cert. denied*, 434 U.S. 1039 (1978).

C. **Homosexuality** — Like sexual relations outside of marriage, sexual orientation enjoys no protection under a constitutional right to privacy. Unless that orientation negatively impacts an employee's ability to perform in his or her role as a teacher, however, any adverse action taken against the employee is unwarranted. *See Board of Education v. Jack M.,* 19 Cal.3rd 691, 139 Cal.Rptr. 700 (1977) (Isolated incident of solicitation in public restroom did not impair teacher's ability to perform duties as conduct was unknown to students).

1. **Statute prohibiting public homosexual conduct was unconstitutional.** A statute declaring "public homosexual conduct" as grounds for a teacher's dismissal or suspension was constitutional, whereas provision prohibiting advocacy, encouragement or promotion of public or private homosexual conduct was overbroad and thus, unconstitutional. *National Gay Task Force v. Board of Education, City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984); *aff'd per curiam*, 470 U.S. 903, 105 S.Ct. 1858 (1985).

2. **Homosexual tendencies not constitutionally protected.** An applicant for a teaching/coaching position claimed he was not hired due to his perceived homosexual tendencies and brought a civil rights action against the principal. The court granted the principal qualified immunity since his decision not to hire the plaintiff did not violate clearly established law. *Jantz v. Muci*, 976 F.2d 623 (10th Cir. 1992); *cert denied*, 113 S.Ct. 2445 (1993).

3. **Speech advocating homosexuality is protected, but lying on job application is not.** A teacher who was a member of a homosexual advocacy organization in college obtained a teaching position upon graduation but failed to list his membership in the "Homophiles" on his employment application. When he received his certification after obtaining employment, the Secretary of Education called a press conference revealing the decision. As a result of this publicity, his employers discovered his sexual orientation. The school transferred him to a non-teaching position and even more publicity ensued. The teacher participated in television and newspaper interviews leading to the district's refusal to reinstate him or renew his contract. The teacher

sued for reinstatement and the court upheld the district's decision. While the teacher's press interviews were constitutionally protected as matters of public concern, his deliberate withholding of his association with the "Homophiles" provided grounds for nonrenewal. *Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498 (4th Cir. 1974); *cert denied*, 419 U.S. 836 (1974).

4. **Speech regarding homosexuality cannot violate FERPA.** In another case involving homosexuality and free speech concerns, a nontenured bisexual counselor was suspended and her contract was not renewed after she revealed her sexual preferences to fellow school employees. The court upheld the action since the statements were not protected speech (they were privately made and did not involve a public matter) and other evidence supported her nonrenewal on grounds of unsatisfactory job performance. Specifically, she revealed the confidences of two students concerning their own homosexuality. *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984); *cert denied*, 470 U.S. 1009, 105 S.Ct. 1383 (1985).

D. **Cohabitation** — Some districts consider cohabitation immoral and have terminated teachers' employment for engaging in this type of activity. Such a decision will stand, though, only if the district can establish a nexus between the conduct and the employee's job.

1. **Community knowledge and disapproval of living arrangements supported termination.** A teacher was living with her boyfriend in a mobile home owned by the district and frequented by students. Her conduct was known, and strongly criticized, by the community. Despite an actual showing of sexual misconduct, an inference of impropriety affecting her competency to teach existed and as a result, her termination was justified. *Sullivan v. Meade City I.S.D*, 387 F.Supp. 1237 (D.S.D. 1975); *aff'd* and *remanded*, 530 F.2d 799 (8th Cir. 1976).

2. **But community knowledge without disapproval is not sufficient cause.** Although there was community knowledge regarding another teacher's cohabitation with her boyfriend, no evidence was shown indicating that the teacher's performance had been affected. Furthermore, the teacher

took steps to correct the situation and married her roommate before the termination hearing was set. *Thompson v. Southwest School District*, 483 F.Supp 1170 (N.D.Mo. 1980).

E. **Unwed Parents** — School districts may not take action against a teacher who is a parent or pregnant based on the fact that she or he is unmarried.

1. **Blanket polices banning unwed parents are impermissible.** Policies calling for mandatory dismissal of unwed parents violate the equal protection clause. *Andrews v. Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir. 1975).

2. **Becoming pregnant while unmarried is not grounds for termination.** Nor may a school district discharge a teacher due to pregnancy out of wedlock. *Avery v. Homewood City Board of Education*, 674 F.2d 337 (5th Cir. 1982); *cert denied*, 461 U.S. 943, 103 S.Ct. 2119 (1983).

3. **Effect of Impaired effectiveness resulting from out-of-wedlock pregnancy.** Neither of the above cases addresses the situation where the board has opted for dismissai after a hearing where a finding, supported by the evidence, was made of a nexus between the unwed pregnancy and job performance. However, some circuits have held that an unwed teacher may not be excluded from the classroom absent a clear showing that her presence will "taint" the education process. *Perry v. Grenada Municipal Separate School District*, 300 F.Supp. 748 (N.D.Miss. 1969). This is a more demanding standard than a mere nexus and such a dismissal appears to have never been upheld in the federal appellate courts.

F. **Miscellaneous Sexual Matters** — Acts which raise eyebrows, although not necessarily criminal, do sometimes lead to termination if they bear a sufficient nexus to the teacher's ability to teach.

1. **Bizarre conduct that is known in community is conduct unbecoming a teacher.** A teacher's dressing, undressing, and caressing a mannequin in his front lawn on a fairly busy street constituted "conduct unbecoming a teacher," especially since the town was fairly small, the conduct had taken place

for more than a year, and the community was aware of the teacher's bizarre behavior. *Wishart v. McDonald*, 500 F.2d 1110 (1st Cir. 1974).

2. **Appearance with nude model in obscene magazine not protected speech.** A male teacher was fired then denied certification for appearing with a woman nude from the waist up in a magazine. The teacher's claim that he could not be fired for exercising his right to free speech failed on obscenity grounds since the magazine promoted sadomasochism and bondage (indeed, the teacher's picture was actually an ad soliciting sexual partners). *Weissbaum v. Hannon*, 439 F.Supp. 873 (N.D.Ill. 1977).

3. **Immorality of engaging in sexual act in public is judged by appeals board—community moral standard is not dispositive.** A teacher was dismissed on immorality grounds arising from his sexual conduct in a booth in an "adult bookstore." The teacher appealed the decision, arguing that "immorality" was subject to many interpretations and that school policies failed to provide him any indication that his conduct was immoral. The Oregon Supreme Court, considering the issue for a second time, reversed the dismissal and remanded the case (again), directing the Fair Dismissal Appeals Board to exercise its own judgment instead of relying on alleged "community moral standards" to interpret "immorality." *Ross v. Springfield*, 716 P.2d 724 [31 Ed. Law Rep. [993]](Or. 1986) (en banc).

4. **Teacher's sex change could have harmful impact on students.** After undergoing a sex change operation, a teacher was suspended by the district then dismissed by the Commissioner of Education for just cause due to the potential psychological harm her new appearance might cause her students. She was denied disability retirement since her incapacity was not physical or mental but instead stemmed from the impact she would have in the classroom. She sued to have her pension reinstated and prevailed since her lack of capacity was due to her physical condition following the operation. *In re Grossman*, 157 N.J.S. 165, 384 A.2d 855 (1978).

Non-Sexual Criminal Conduct — Felony convictions and other crimes involving moral turpitude constitute good cause for dismissal. For a crime involving moral turpitude, a conviction may not be necessary if the charges are supported by the facts.

A. **Drug Use or Possession**

1. **Acquittal of drug-selling charges did not remove good cause where evidence that teacher engaged in the conduct was admitted at the dismissal hearing.** Although a college professor was acquitted of selling cocaine, facts omitted in the criminal trial but admitted at the dismissal hearing supported a finding that he had aided a friend's intended sale of the drug, an immoral act showing unfitness to teach. The court also indicated that the arrest was known among the students and faculty, thus impairing the teacher's relationships with them. *West-Valley Mission College v. Concepcion*, 21 Cal.Rptr. 2d 5 (Cal.App. 6 Dist. 1993).

2. **Discharge and dismissal of criminal proceedings does not bar termination.** A teacher successfully completed probation after a conviction for drug possession and his record was expunged. However, the discharge and dismissal of the criminal proceedings did not bar his termination for immoral conduct. "The statutory expungement of one's criminal record does not erase the fact that the party committed the act, nor does it erase the moral turpitude of the act." Although the teacher's guilty plea could not be entered into evidence in the hearing, other evidence substantiated the charges. *Dubuclet v. Home Ins. Company*, 660 So.2d 67, 103 Ed. Law. Rptr. 547 (La.App. 4th Cir. 1995).

3. **Role models do not allow marijuana to be grown in their homes, therefore, dismissal is not an excessive sanction.** The police searched a teacher's house and found evidence that her husband had been growing and selling marijuana. The teacher admitted that she was aware of her husband's activities and opposed to them, but was afraid to report him to the police or do anything that might cause the break-up of her family. The district terminated her for immorality and neglect of duties, expressing that her conduct was contrary to her duty to serve as a role model for her students and her credibility for teaching the anti-drug program was

undermined. The court held that the teacher's duty to act as a good role model existed regardless of the teacher's personal circumstances and was independent of the ease or difficulty of complying. Therefore, dismissal in this case was not an excessive sanction. *Jefferson County School District v. Fair Dismissal Appeals Board*, 812 P.2d 1384 (Or. 1991).

B. **Theft**

1. **Actual impairment of ability to teach need not be shown when teacher commits a felony.** A teacher was arrested for burglary and theft of a furniture store. Following a diversion agreement with the court, he was transferred to a different school. The Secretary to the Professional Practices Commission, upon learning of the arrest, suspended his license. The teacher appealed, claiming that his conduct had not impaired his ability to teach. The court affirmed the suspension, indicating that there is a presumption that felonious conduct has a sufficient relationship or nexus to a teacher's fitness to perform his or her job. *Hainline v. Bond* 824 P.2d 959 (Kan. 1992).

2. **The conviction of a crime involving moral turpitude raises a presumption that the teacher is unfit.** A larceny conviction for diverting electricity supported a teacher's termination as a crime of moral turpitude. This court also indicated that the commission of a crime involving moral turpitude raises at least a presumption that there is a nexus between the act and the teacher's fitness to teach. *Kenai Peninsula Borough Board of Education v. Brown*, 691 P.2d 1034 (Alaska 1984).

3. **A teacher must serve as a role model even on his own personal time.** A tenured special education teacher's conviction for embezzlement of funds from a company has worked for while teacher created good cause for termination. Although an individual's actions on his own personal time is normally not subject to employer's scrutiny, a teacher must serve as a role model for students. A conviction for embezzlement, a crime of moral turpitude, creates a presumption that teacher is unfit to teach, thus granting the school district good cause to terminate him. *Sutterfield v. Grand Rapids Schools,* 556 N.W.2d 888 (Mich. App. 1996).

B. Fraud, Misrepresentation and Misappropriation

1. Fraud Against the Government

a. **Falsifying IRS documents is good cause.** A principal's conviction for filing false documents with the IRS justified his dismissal. *Logan* v. *Warren County Board of Education,* 549 F.Supp. 145 (S.D. Ga. 1982).

b. **Tax evasion and subsequent bizarre behavior supports termination.** A tenured teacher pled guilty to three counts of tax evasion. During the pendency of the criminal charges and during his probation, the teacher exhibited bizarre behavior which was widely publicized, such as going on a hunger strike, renouncing his citizenship, and refusing to recognize the U.S. government as a legitimate government. The court held that the teacher could be terminated for criminal conduct which diminished his effectiveness, as the conduct here undoubtedly did. *McCullough v. Illinois State Board of Education*, 562 N.E.2d 1233 (Ill.App. 5 Dist. 1990).

c. **Welfare fraud merits revocation of certificate.** A welfare fraud conviction justified revocation of a teacher's certificate. *Stelzer v. State Board of Education*, 595 N.E.2d 489 (Ohio App. 3 Dist. 1991).

d. **Inherent dishonesty of certain crimes, such as trafficking in counterfeit goods, demonstrates that teacher is unfit.** School district's termination of teacher on "immorality" grounds valid when teacher convicted of trafficking in counterfeit goods, a crime based on deceit, untruthfulness or falsification. The court reasoned that the inherent dishonesty of such a crime conclusively demonstrates that the teacher is both unfit to teach and a poor role model to students whom he is supposed to foster and elevate. Based on this, the school board had good cause to terminate the teacher's contract. *Kinniry v. Abington Sch. Dist.*, 673 A.2d 429 (Pa. Cmwlth. 1996).

2. Fraud Involving the School

a. Misappropriating Funds

i. **Falsifying documents compromises integrity and respect in classroom.** Welding instructor who was in charge of the district's participation in a federal surplus property exchange program submitted false reports to the program and violated program regulations (e.g. reselling property in violation of a restriction against doing so). Through his actions, he was partially responsible for costing the school $54,000 which cost him his job. He appealed, claiming, among other things, that his acts bore no relation to his fitness to teach. The court disagreed, finding that the charges against him compromised his integrity and respect in the classroom. *Cochran v. Board of Education of Mexico School District No. 59*, 815 S.W.2d 55 (Mo.App. 1991).

ii. **Accepting kickbacks is good cause.** A Director of Maintenance, Matthew Closs, was investigated and indicted for stealing school property and accepting kickbacks from contractors. While the indictments were pending, the district conducted its own investigation and terminated the employee's contract for good cause. The board's decision was appealed to the administrative agency, which upheld the board's finding that good cause existed. Closs then appealed to state court, alleging among other things, that his due process rights were violated because the district's hearing took place while he was still under criminal indictment, thus he could not testify for fear of waiving his Fifth Amendment privilege.

The court held that "[a]lthough Closs was in a predicament because of the parallel criminal and administrative proceedings, this does not amount to a denial of due process by the board." He was not required to testify, but rather chose not to. The board's decision to terminate him rested not upon his refusal to testify, but rather upon evidence presented at the hearing. *Closs v. Goose Creek Indep. Sch. Dist.*, 874 S.W.2d 859 (Tex. App.—Texarkana 1994).

b. **Falsifying Records**

i. Falsifying sick leave may warrant dismissal in egregious cases.

a) After unsuccessfully attempting to obtain the superintendent's approval for personal leave in order to go on a long-planned ski trip, two teachers went anyway and called in sick from the slopes. Upon returning to work, they filed absence certificates indicating that their absence was due to "personal illness"—namely psychological stress necessitating a week off from work. The teachers were dismissed for misconduct. The decision was appealed and the court upheld the decision as "a teacher's misrepresentations regarding his or her unexcused absences are properly the subject of immorality charges." *Riverview School District v. Riverview Education Association, PSEA-NEA*, 639 A.2d 974 (Pa. Cmmw. Ct. 1994).

b) In similar cases, the terminations of two school employees who drove trucks for private companies while collecting sick pay were upheld. *Lewis v. Minneapolis Board of Education, Special School District #1*, 408 N.W.2d 905 (Minn.App. 1987); *Board of Education of Laurel County v. McCollum*, 721 S.W.2d 703 (Ky. 1987).

c) On the other hand, a teacher who left a message on the district's absence tape three days before spring break stating he would be absent due to sickness, but who instead took a trip to Florida with his family, did not deserve termination. Although he had falsified documents, his actions were somewhat excused since he was under severe emotional pressure at the time due to a deteriorating marriage and the trip was an attempt to maintain family stability. The hearing referee recommended suspension instead of termination and the court agreed that this was the proper sanction given the situation. *Katz v. Maple Heights City School District Board of Education*, 622 N.E.2d 1 (Ohio App. 8 Dist. 1993).

d) Similarly, in *Board of Education of Round Lake v. State Bd. of Educ.*, 685 N.E.2d 412. [121 Ed. Law Rpt. [821]] (Ill. App. 2 Dist. 1997), a teacher's dismissal for insubordination for taking unauthorized leave was overturned where vacation had been scheduled prior to winter break being eliminated and granting of leave after elimination of break was pursuant to unreasonable, "spur-of-the- moment" oral policy.

c. **Falsifying or forging information on a certification or employment application is grounds for dismissal.** *Nanko v. Department of Education*, 663 A.2d 312 (Cmmw. Ct. Pa. 1995); *Acanfora v. Board of Education, supra.* For example, a teacher's termination was proper when he failed to disclose to the district that he had previously been dismissed from a prior district for engaging in an inappropriate relationship with a student. Teacher further asserted in his application to the district that he had never been dismissed or asked to resign for any offense involving moral turpitude. Failure to disclose this information constituted immorality and was valid grounds for termination. *Toney v. Fairbanks North Star Borough Sch. Dist.*, 881 P.2d 11112 (Alaska 1994).

D. **Alcohol-Related Offenses**

1. **Conviction of DWI and related crimes warrants termination even for alcoholics.** Conviction of DWI and public intoxication, coupled with a subsequent conviction of resisting arrest and driving without a license justified termination for immorality. The teacher appealed, claiming an equal protection violation since testimony indicated he was an alcoholic and other teachers with alcohol-related problems *or* arrests were not terminated. This argument failed, however, since he failed to show different treatment of anyone similarly situated, that is, with both arrests and alcohol-related problems. *Vukadinovich v. Board of School Trustees of Michigan City Area Schools*, 978 F.2d 403 (7th Cir. 1992); *cert denied* 114 S.Ct. 133 (1993).

2. **On the other hand, conviction of DWI insufficient grounds for termination of driver's education teacher who was certified to teach other courses.** Dismissal of a tenured driver's education teacher for one DWI conviction and a pending DWI charge was reversed. Although the teacher could no longer teach driver's education, he was certified to teach other classes (health and biology) which had been filled with non-tenured teachers. *Alabama State Tenure Commission v. Lee County Board of Education*, 595 So.2d 476 (Ala. 1991), on remand 595 So.2d 482 (Ala.Civ.App. 1992).

3. **Unsupported allegations of drunkenness and abuse of an elderly person did not allow termination.** School board's charges of drunkenness, abuse of disabled persons, and an immoral sex act were unsupported by the facts and, as such, were not grounds for a teacher's termination. The facts revealed that the teacher, who had no prior record, engaged in an alcohol-related binge during the summer time from which all the charges arose. She was criminally charged with a misdemeanor to which she pled nolo contendre but her record was later expunged. The "drunkenness" occurred in her home and the conduct ensuing therefrom, including her involuntary

commitment into a mental institution, was not publicly known. The court determined that her acts were atypical and did not render her incompetent to teach. *Clark v. School Board of Lake County, Florida*, 596 So.2d 735 (Fla.App. 5 Dist. 1992).

E. Violent Crimes

1. **Walking into a public place while armed supports dismissal.** A tenured teacher was terminated for "immorality" after approaching a local pool hall armed with a shotgun and a pistol and telling officers he was looking for a friend in order to "show him the bullets." His arrest and subsequent conviction was widely publicized, and community members testified that it affected his ability to serve as a role model for his students. The teacher appealed the termination, alleging that the term "immorality" was unconstitutionally vague. To the contrary, the court held that, as it related to the dismissal of a tenured teacher, immorality means "such conduct that by common judgment reflects upon a teacher's fitness to teach." A reasonable teacher would put his professional position in jeopardy. As such, the termination was upheld.

2. **...and you can be fired for intentionally shooting a person.** The meaning of immorality was again challenged in *In Re Thomas*, 926 S.W.2d 163 (Mo. App. E.D. 1996), in which a teacher appealed her termination for shooting her estranged husband's girlfriend. Intentionally shooting someone without legal justification is immoral conduct, and despite the fact that the incident did not involve students or school property, it rendered the teacher unfit. In reaching this conclusion, the court considered the following factors:

    a. the age and maturity of the teacher's students;

    b. the likelihood that the teacher's conduct will have an adverse effect on students or other teachers;

    c. the degree of anticipated adversity;

    d. the proximity of the conduct;

e. extenuating or aggravating circumstances surrounding the conduct;

f. likelihood that the conduct would be repeated.

g. underlying motives; and

h. the chilling effect on the rights of teachers.

NON-SEXUAL MISCONDUCT INVOLVING STUDENTS

A. Drugs or Alcohol Related Misconduct

1. **Providing alcohol to underage students warrants dismissal.** *Norton v. Board of Education of Jefferson County*, 748 P.2d 1337 (Colo.App. 1987).

2. **Allowing underage drinking to take place is neglect of duty.** Permitting students to use drugs or alcohol in teacher's presence warrants action. While on an out-of-town trip, teacher permitted students to smoke and drink in their motel room and played a drinking game with them. Despite the teacher's protestations that she tried to dissuade the students from drinking and when this failed, stayed in the room solely to keep the students safe and supervised, the court found that her termination for neglect of duty was supported by the facts. *Blaine v. Moffat County School District*, 748 P.2d 1280 (Colo. 1988) (en banc) (the dissenting judges felt that given the teacher's inexperience, the sanction imposed was overly harsh).

3. **Smoking marijuana with students in the privacy of teacher's own home is grounds for termination.** Two teachers were dismissed for smoking marijuana in their apartment with two students during the summer. The teachers appealed arguing that they could not be fired for acts committed in the privacy of their own home while school was not in session. The court disagreed stating: "the evidence indicates that there was serious misconduct of an immoral and criminal nature and a direct connection between the misconduct and the teacher's work," thus supporting termination. *Board of Education of Hopkins County v. Wood*, 717 S.W.2d 837 (Ky. 1986).

B. Inappropriate Actions Affecting Students

1. **Allowing co-ed slumber parties is good cause**. Allowing male and female students to sleep in the same hotel room while teachers left to attend a party was sufficient evidence of teachers' immorality rendering them unfit to teach. *Schmidt v. Board of Education of Raytown*, 712 S.W.2d 45 (Mo.App. 1986).

2. **Encouraging vandalism is grounds for termination.** In addition to other acts, finding that teacher encouraged a student to vandalize the principal's car supported finding of misconduct and subsequent dismissal. *Scheiber v. New York City Board of Education*, 593 N.Y.S. 563 (A.D.2 Dept. 1993).

3. **... so, too, is encouraging students to commit murder.** A Texas teacher's teaching certificate was permanently revoked due to her conviction for felony solicitation of juveniles to commit murder in another state. *TEA, Division of Teacher Records v. Long*, Tex. Comm'r Educ. Dkt. No. 108-TTC-1288 (1989).

4. **Attempting to gain legal custody of an un-related student impairs effectiveness.** Fostering a parent-child relationship with a student and attempting to gain legal custody of him clouded a teacher's professional judgment and caused disruption in the district, thus creating good and just cause to dismiss a teacher. *Kerin v. Board of Education, Lamar School District No. RE-2, Prowers County*, 860 P.2d 574 (Col.App. 1993).

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* Portions of this outline are taken from the TASB publication, "When Can You Take Action Against an Employee For Conduct That Occurs Off—Campus?," by Debra Moritz, 1996.

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NATIONAL SCHOOL BOARDS ASSOCIATION / COUNCIL OF SCHOOL ATTORNEYS

2000 ADVOCACY SEMINAR

(PHOENIX, ARIZONA)

Private Businesses and Schools: Fundraising, Vending Agreements and Other Commercial Activities

Presented by:

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I. Introduction

II. Scope of Commercial Activity

A. Pouring Rights" Agreements

B. Other Commercial Activity

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3. Marketing Research Survey Agreements
4. Appropriation of Space
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9. ITFS Licenses (FCC) – Schools and the Telecom Industry

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B. Students' right to choose

C. Employees and children becoming a captive audience for corporate giants

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A. Significant financial benefits for districts

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C. "Upfront" annual payments for exclusivity

  1. Right to be the exclusive beverage vendor
  2. Real source of financial gain for school districts
  3. Beware of the "Strings Attached" to upfront payment, e.g. advance on commissions

D. Monthly/quarterly commission payments

E. Monies from recycling deposits

F. Administrative procurement fees

V. Legal Environment

A. State Constitution -- Gifts Prohibited
  -- Arm's length negotiation with a vendor to obtain fair market value

B. Use of District Property (New York Education Law §414)

  1. No product endorsements ("Official Cola")
  2. Allow students to opt out
  3. "School purpose" -- something to drink

C. Electronic Commercial Promotional Activity Prohibited

  1. Part 23 of the New York State Regents Rules forbids contracting to permit electronic commercial promotional activity on school premises (Channel One)
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  3. Now interpreted to include print, television, radio, cable and internet promotional activity

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B. Remember: The District's goal should be to obtain an economically rewarding proposal, while at the same time maintaining necessary control

C. Recommended RFP Provisions

D. SED "Model Contract" Provisions

E. Other Recommended RFP Provisions

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2. Vending and Fountain Equipment
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4. Duration of Contract
5. Price Escalation Provision
6. Delivery
7. Insurance
8. Statutory Compliance
9. Assigning or Subletting of Contract
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11. State and Federal Nutritional Guidelines
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VII. Other Commercial Activities

A. Electronic Marketing

B. Incentive Programs

C. Marketing Research Surveys

1. Questionnaires filled out by students
2. Data sold to others
3. Compensation/gifts to schools
4. Privacy issues

D. Appropriation of Space

1. Example: McGraw-Hill math textbook which used brand names in its problems (e.g. how many Volkswagen Beetles would it take to ...?)
2. States such as California have enacted legislation to prohibit such ad-carrying textbooks
3. New York prohibits ads on school buses

E. Endorsements by Schools - Guidance from Attorneys General Report (April 1999)

1. Consumer (Parents/Students) Perceptions
2. Common Sense Legal Guidance Principles
    a. Reserve right to review use of name and logo
    b. Make clear in promotional materials that:
        i. there is no endorsement by school
        ii. corporate sponsor paid for use of name and logo
        iii. relationship with corporate sponsor is exclusive

F. Sponsorships/Partnerships: Businesses and Schools

G. Sale of "Naming Rights" for School Properties

1. Considerations

2. Protections

H. ITFS Licenses (FCC) - Schools and the Telecom Industry

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2. Early Stages - Wireless Cable

3. Now: Broadband Internet Access (2-way)

4. Potential Impact

Exploring Issues Raised by School-Business Contracts and "Commercialism" in the Electronic Frontier

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Like bees to honey, commercial entities are drawn to the spending power wielded by students – and, by association, their parents.

It nearly axiomatic, then, for this attraction to translate into overtures toward school districts – a place where young people are captive audiences and impressionable consumers. In such an environment, companies compete for access – exclusivity preferred – in exchange for conferring such goodies as cash, in-kind services, or one-time megawatt expenditures (like a sports stadium) that seem enticing to cash-strapped school officials.

Now, the next frontier is the electronic realm. Companies are paying for access to the district's electronic systems – a technique for capturing the attention not only of youth, but parents and other community members that might look to schools for information.[1] A twist on that theme is that Web sites also offer profits to schools for driving traffic through the commercial Web site or they will share a percentage for purchases made via the site.

Until now, a for-profit entity would negotiate based on visibility or product placement. For example, marketplace competitors would vie for the right to place a logo on sports stadium walls or to acquire "pouring rights" as the predominant or exclusive soda pop offered at meals and available in school vending machines. Other times, the agreement is couched in the form of profit sharing from fundraising campaigns.

While those conventional approaches are still popular, the prospect of meeting potential buyers at the computer or television screen seems too hard for businesses to resist. That new direction, though, raises a host of legal and administrative issues that must be dealt with and decided upon by the local board of education. Some questions are the same as arise in the more conventional school-business context, while some are unique to electronic climes.

Electronic marketing arrangements with schools are clearly on the rise and will likely continue. Of course, the pioneer in this area is Channel One, a private enterprise founded in 1990 and which proclaims to link "12,000 American middle, junior and high schools representing over 8 million students and 400,000 educators"[2]. The company gives free televisions, videocassette recorders and other equipment to schools that agree to broadcast its 10-minute news show plus two minutes of commercials. Almost from the outset, some parents and educators have criticized it for mixing substantive material with promotional advertising. Philosophically, some individuals and organizations believe that public school learning should not be used as a platform to influence purchasing decisions. Channel One, as the first, one of the largest and one of the most direct in delivering its advertising messages, has come under much criticism of late for helping to commercialize the school environment.[3]

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[1] James McNeal, a professor at Texas A & M University, contends that children aged 4 to 12 spend almost $25 billion of their own money, directly influence $188 billion of their parents' spending and have an indirect influence on another $300 billion. Del Stover, *Schoolchildren Are a Valuable Asset to Market Researchers*, SCHOOL BOARD NEWS, October 12, 1999, at 5.

Another popular model is used by companies like ZapMe! Corporation, which offer school districts computers and Internet services in exchange for permission to monitor student use for marketing and research purposes. ZapMe!, which has been operating since 1998 and is based in San Ramon, Calif., is aimed at middle school and high school students. Under a contract, the company installs personal computers and high-speed Internet connections that permit access to 12,000 specially selected educational sites. The company posts advertisements that flash on the computer screens and requires school districts to pledge that the terminals will be in use an average of 4 hours each school day.

The more controversial side, however, concerns its practice of collecting personal information like names, addresses and telephone numbers. The electronic system gives ZapMe! the option of tracking and reporting students' Internet usage by age, gender and school zip code. The contract permits ZapMe! to sell information to advertisers, and a *New York Times* story reports that the company does that with Microsoft and Toshiba who supply the computers.[4] ZapMe has been installed in approximately 1,800 schools so far.

Similarly, a company called HiFusion, which started in April 2000, gives schools and parents free Internet service and the opportunity to "chat" on-line. The software used to accomplish this contains advertisements and enables the company to gather information about students such as their names, addresses and buying preferences. The Virginia-based HiFusion's privacy policy pledges that "We never share or sell your Personal Information to third parties for marketing or advertising." But it does confess to collecting information "to target the advertising delivered to you."[5]

One potential problem with accepting software in exchange for corporate access is that the providers distribute those products to build brand exposure and build future market share. It "does not necessarily mean they offer the best value. For example, the free hardware and software might not be the most appropriate for realizing a school's instructional goals."[6]

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[2] Channel One Web site: www.channelone.com/eclubs/about_us.html

[3] On May 20, 1999, the Senate Committee on Health, Education, Labor and Pensions heard testimony about Channel One.

[4] Constance L. Hays, *New Report Examines Commercialism in U.S. Schools*, N.Y. TIMES, Sept. 14, 2000, at http://www.nytimes.com/2000/09/14/business/14SCHO.html.

[5] HiFusion Web site Privacy Policy -- http://www.HiFusion.com/splash/privacy.html#3.

As well, in some cases students are live subjects for commercial research. Companies can conduct market research via the Internet by having students serve on a virtual panel and responding to surveys or questions as they are posed on-line. On occasions students also participate in mock shopping games and contests in which they reveal their preferences for certain items. At least 1,000 schools have participated in market research conducted by the Kansas-based Education Market Resources.[7] In another example, one New Jersey school district in 1999 accepted $7,100 to allow Noggin, a then-new TV channel for children, to survey students, conduct focus groups, observe children in class and have them do an assignment.

The marketing-information sleuthing approach has been much criticized lately and was the subject of legislation in the spring of 2000. U.S. Senators Christopher Dodd (D-Conn.) and Richard Shelby (R-AL) sought an amendment to the Elementary Secondary Education Act mandating parental consent before personal information could be collected from or about students (Shelby-Dodd Student Privacy Amendment). Like ESEA itself, the measure is still awaiting action in Congress. Other legislation addressing commercial involvement generally in schools and information gathering in particular, were introduced in both the U.S. House of Representatives and U.S. Senate in the fall of 1999. Neither passed.

In this regard, the Children's On-Line Privacy Protection Act (COPPA) which became effective in April 21, 2000 will not necessarily help. COPPA applies to commercial Web sites and on-line services directed to children younger than 13, and which collects personal information from children. It also applies a general audience Web site in which operator has actual knowledge that it collects personal information from children. COPPA demands that a Web site operator notify users of the site of its information practices and that parental consent must be obtained before collecting, using or disclosing personal inform obtained from the child. Arguably, ZapMe!, HiFusion and others can avoid the burdens of the act by contending that they are software providers and their collection of information is incidental to contract and not congruent with the operation of a Web site. Also, the main target audience is generally middle and senior high schoolers who are outside the age-range of COPPA.

More generally, the question of on-line privacy has been percolating at the Federal Trade Commission (FTC). In July 2000, the FTC approved a plan drafted by Internet advertisers in the Network Advertising Initiative to self-regulate the gathering of information used to profile Web customers. The plan requires companies to notify customers of their Internet profiling activities and to give customers a chance to choose whether they want their information stored by advertisers. The companies also planned to provide individuals with "reasonable access" to personally identifiable information collected about them and to make "reasonable efforts" to protect what they collect.

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[6] Alex Molnar, *ZapMe! Linking Schoolhouse and Markeplace In a Seamless Web*, PHI DELTA KAPPAN, April 2000, at 601.

[7] Del Stover, *Schoolchildren Are a Valuable Asset to Market Researchers*, SCHOOL BOARD NEWS, October 12, 1999, at 5.

In yet another example of electronic ingenuity, the New York City school board voted recently to create a separate, board-owned company to offer a Web portal and free Internet services. For a fee, businesses become a sponsor and can buy licenses to use a board of education logo in their advertising. Also, whenever a subscriber uses the service to shop on-line, the district receives a commission on purchases. The board anticipates that the arrangement will generate enough dollars to purchase 85,000 laptop computers, Internet devices and other electronic gear for 8th graders each year.

In September 2000, the board of education began to ponder a plan that would provide each of its students with computers and access to the Internet – an ambition that could cost $900 million.[8] A report generated by Andersen Consulting suggested that the board could pay for the computers and garner even greater profits by selling advertising on the new Web site portal. The consultants predict that revenues could be as high as $4 billion annually over the next 10 years. That prospect, however, has sparked opposition form parents, legislators and some educators. Two proposed solutions that have been advanced are to have separate commercial and educational content or allowing parents to block access to sites they deemed objectionable.

Education organizations are also concerned about the phenomenon of commercial advertising and schools. The National PTA has developed, "Guidelines for Corporate Involvement", a series of eight principles that schools should consider in a school-business partnership.

The Center for Commercial-Free Public Education makes four recommendations in its model policy for school boards when it comes to electronics. The Oakland, Calif.-based organization is a well-known opponent of "commercialism in schools" meaning a wide range of agreements between school districts and businesses.

The principles are:

Advertising in Electronic Media

1. Except for courses of study which have specific lessons related to advertising, students shall not be required to observe, listen to or read commercial advertising in the classroom.

2. The school district shall not enter into any contract to obtain electronic equipment or software, that will obligate the district to expose students to advertising directed at young people during school time or at home while completing school assignments.

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[8] *School Board Moves on Ad-Financed Laptops*, NEW YORK TIMES, September 20, 2000.

3. The school district shall not enter into any contract to obtain electronic equipment or software, that will obligate the school to post information about school procedures or events on electronic media that contain advertising directed at students.

4. The school district will not enter into any contract for electronic media services, where personal information will be collected from the students by the providers of the services in question. Personal information includes, but is not limited to, the student's name, telephone number and home address.

Likewise, the National Association of State Boards of Education in 1998 adopted guidelines of "Corporate Involvement in School". The statement is as follows:

Corporate Involvement in Schools

School-business relationships based on sound principles can contribute to high quality education. However, compulsory attendance confers on educators an obligation to protect the welfare of their students and the integrity of the learning environment. Therefore, when working together schools and businesses must ensure that educational values are not distorted in the process. Positive school-business relationships should be ethical and structured in accordance with the following principles:

1. Corporate involvement shall not require students to observe, listen to, or read commercial advertising.
2. Selling or providing access to a captive audience in the classroom for commercial purposes is exploitation and a violation of the public trust.
3. Since school property and time are publicly funded, selling or providing free access to advertising on school property outside the classroom involves ethical and legal issues that must be addressed.
4. Corporate involvement must support the goals and objectives of the schools. Curriculum and instruction are within the purview of educators.
5. Programs of corporate involvement must be structured to meet an identified education need, not a commercial motive, and must be evaluated for educational effectiveness by the school/district on an ongoing basis.
6. Schools and educators should hold sponsored and donated materials to the same standards used for the selection and purchase of curriculum materials.
7. Corporate involvement programs should not limit the discretion of schools and teachers in the use of sponsored materials.
8. Sponsor recognition and corporate logos should be for identification rather than commercial purposes.

The National School Boards Association takes no position on business relationships, believing that it is a decision best left to local communities.

Issues to Consider When Opportunities Unfold

Here are some basic principles to think about:

1. *Attorneys are crucial guides when discussing electronic access rights.*

Unlike philanthropy, what is being negotiated is not a charitable contribution but a business agreement – just like with a vendor. Attorneys should help with the arms-distance talks and advocate for terms that are in the best interest of the school district and the children.

2. *Make certain to keep the needs of children foremost in your dealings.*

3. *Make sure to limit the time period of the contract or to reserve the option to re-open the contract under changed circumstances.*

This is a sound practice because it establishes greater freedom for school districts to maximize economic gains in an ever-changing marketplace. It might also be the best legal path, since it is questionable whether a current sitting board can bind successor boards on such matters, unless a law explicitly grants that authority.

4. *Be concerned about what information the district must relinquish – particularly about children – as a condition of receiving any benefits offered.*

Think about privacy considerations and whether a business will use the special connection to the school to engage in potentially intrusive advertising or marketing activities.

5. *Be careful about making promises regarding a specific place on the district's Web site*

Circumstances can change and the place reserved for commercial entities during negotiations may not exist in the future. In addition, some of the most coveted, visible spaces of a district's Web site carry value for the district in communicating its own messages.

6. *Understand that money and flexibility operate in inverse proportions.*

For businesses, exclusivity, visibility and certainty are precious commodities. The more money they pay, therefore, the better the bargain they will demand – meaning less flexibility in district decision making.

7. *Be prepared for criticism from some segments of the community and the possibility of legal action from either spurned competitors or disgruntled citizens who challenge either the outcome or the perceived harmful results.*

A promise of exclusivity or dominance inevitably shuts out or disadvantages competitors. Sometimes, losing businesses file a legal challenge, charging that the board of education acted outside of its authority and contrary to its own procedures and therefore the contract is void. Thus, school representatives should be mindful that the procedure is fair and open and not tilted toward one party above all others

Similarly, there are highly organized pockets of resistance to schools entering into business relationships with for-profit companies. National groups decry what is perceived as "commercialism" in schools. For example, The Center for Commercial-Free Public Education holds as its mission to provide "support to students, parents, teachers and other concerned citizens organizing across the U.S. to keep their schools commercial-free and community controlled."

8. *Administrative issues arise in the course of brokering and executing the deals and standards must be set.*

As mentioned previously, the school board needs to develop a district policy or practice for handling electronic opportunities. Questions arise as to whether all such relationships will be centralized, or whether principals are free to broker their best deal. What level of community involvement is desired or necessary before an initiative can move forward?

As well, while many existing policies address such issues as raffle tickets and coupon distribution – many are simply unequipped to oversee media-based advertising such as Channel One, HiFusion and ZapMe!

The policy needs to address the question of who will have the final authority on matters involving commercial entities. Many school boards delegate the responsibility to the superintendent, others make decision makers of principals.

9. *Electronic fundraising is increasing in popularity.*

Another form of electronic commerce in schools comes under the aegis of fundraising.

There are numerous Web Sites that help generate cash when individuals make purchases via a specific portal or simply visit the Web site and then designate a school. Among them are:

Shopforschool.com
KickStart.com
SchoolPop.com
SchoolCash.com
Efundraising.com
Technology4kids.com
4mycommunity.com
powertrust.com

10. Philanthropy is not always what it seems.

Although corporate giving and philanthropy seem to comes with no strings attached, a prominent name placement in exchange for a donation, or developing a habit in children and their parents, is a peripheral benefit that serves the entrepreneurial appetite for recognition. Accordingly, the Virginia-based American On-Line offers advertising free, no-cost Internet access to schools and the possibility of free e-mail service. While there are no specific quid pro quo requests made in return for this philanthropy, the company sees itself developing a habit – and potential present or future clientele – in offering their services at no charge. The reasoning is that if students and relatives become comfortable in the AOL format for accessing the Internet, then they will become paying customers at home or on the job.

Other forms of philanthropy come via contests, promotions and charitable giveaways. Pizza Hut, for example, has a reading incentive program, some business grant rewards for students who make the honor roll, Foot Locker has a drug-free pledge and Lenscrafter provides glasses for impoverished youngsters. The same sorts of incentives could have an electronic hook if they are structured that way.

11. *Be cognizant of and sensitive to equity issues.*

For companies, their unbridled mission is to ensure and enhance profit. Yet, when discussing income generated by relationships with commercial companies, it implicates fundamental issues of fairness. For example, should money be directed to specific school buildings that are targeted by the companies – usually the larger facilities and those geographic areas with the most economically well-off families, for example – or does all income accrue to the district as a whole. If the process is centralized, what formula is used to distribute the money and what restrictions will be place upon it?

U.S. General Account Office Report on Commercialism and Public Schools

A September 2000 report done by the United States General Accounting Office (GAO) identified four categories in which commercial activities occur. They are: (1) the sale of products; (2) direct advertising – for example, advertisements in school corridors or on school buildings; (3) indirect advertising – for example corporate-sponsored educational materials or teacher training, and (4) market research.[9] All four categories can potentially apply to commercialism in the electronic milieu.

The report, called, "Public Education: Commercial Activities in Schools" found that 19 states have statutes or regulations that address school-related activities. Yet, in 14 of those states the statutes and regulations are not comprehensive and permit or restrict only specific types of activities.

The 45-page GAO document aptly summarizes the issue this way: "Although the types of arrangements vary, their purposes are similar. In general, schools want cash, equipment, or other assistance in providing services and technology during a period when revenues from traditional tax sources are, for many school districts, essentially flat. Businesses want to increase their sales, generate product loyalty, and develop climates favorable to their products, although some businesses are involved with schools primarily to help local communities."

GAO noted that one high school it visited had replaced its newspaper with an Internet Web page and then sold ads on the Web page to help support the journalism program. Such an approach raises questions of propriety, access (for those students who may not have Internet access at home and no opportunity to do so at school), administrative investment (to solicit the ads, ensure they get placed on the site in a timely way and to collect the revenue) and other questions that defy easy answers.

Some schools have electronic message boards on campus and use that forum as an opportunity to solicit advertising and increase school funding.

Selected Web Resources

The Center for Commercial-Free Public Education
http://www.commercialfree.org

Center for the Analysis of Commercialism in Education
University of Wisconsin-Milwaukee
http://www.uwm.edu/Dept/CACE

Federal Trade Commission
"How to Protect Kids' Privacy Online"
Outlines requirements of the Children's Online Privacy Protection Act
http://www.ftc.gov/bcp/conline/pubs/online/kidsprivacy.htm

National PTA
Guidelines for Corporate Involvement

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[9] *See* **Appendix 1** -- Table 1: Categories of Commercial Activities

http://www.pta.org/programs/guidelines1.htm

Appendix 1

Table 1: Categories of Commercial Activities

Activities	Examples
Product sales	
Product sales benefiting a district, school, or student activity	• Exclusionary contracts or other arrangements between district consortia, school districts, or schools and bottlers to sell soft drinks in schools or on school grounds • Contracts or other arrangements between districts or schools and fast food companies to sell food in schools or on school grounds • Contracts or other arrangements between districts or schools and companies providing school pictures, yearbooks, class rings, caps and gowns, or gym uniforms
Cash or credit rebate programs	• Programs that award cash or equipment to schools in proportion to the value of store receipts or coupons collected by the schools • Credit or shopping card programs that award a percentage of the amount of customer charges to a school designated by the customer • Internet shopping programs that donate a percentage of a customer's charges to a designated school
Fundraising activities	• Short-term sales of candy, magazines, gift wrap, cookie dough, concession items, and the like by parents, students, or both to benefit a specific student population or club
Direct advertising	
Advertising in schools, in school facilities, and on school buses	• Billboards and signs in school corridors, sports facilities, or buses • Product displays • Corporate logos or brand names on school equipment, such as marquees, message boards, scoreboards, and backboards • Ads, corporate logos, or brand names on posters, book covers, and student assignment books
Advertisements in school publications	• Ads in sports programs, yearbooks, school newspapers, and school calendars
Media-based advertising	• Televised ads aired by Channel One or commercial stations • Computer-delivered advertisements by ZapMe! and commercial search engines • Ads in commercial newspapers or magazines
Samples	• Free snack food or personal hygiene products
Indirect advertising	
Corporate-sponsored educational materials	• Dental hygiene units that provide toothpaste and toothbrush samples and display brand names • Materials on issues associated with particular industries that are developed by those industries, such as ecology units produced by oil and plastic companies and safety units produced by insurance companies • Materials that promote industrial goals, such as energy conservation materials produced by power companies and nutritional information produced by dairy or meat associations
Corporate-sponsored teacher training	• Training by computer or software companies on the use of hardware or software systems that they sell • Training by companies on general subjects, such as management techniques or creativity
Corporate-sponsored contests and incentives	• McDonald's poster contests, Pizza Hut's Book-It program, Duracell Battery Company's invention contest
Corporate grants or gifts	• Corporate gifts to schools that generate commercial benefits to the donor
Market research	
Surveys or polls	• Student questionnaires or taste tests
Internet panels	• Use of the Internet to poll students' responses to computer-delivered questions
Internet tracking	• Tracking students' Internet behavior and responses to questions at one or more Web sites

Source: GAO analysis.

Doing Business With Business – Product Endorsements / Vendor Contracts: The Role of the School Board Attorney

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INTRODUCTION

"Quite honestly, they were smarter than us." That was what John Bushey, a Colorado Springs school official, told a *New York Times* reporter about the exclusive vending contract his district entered into with Coca-Cola.[1] Under the contract, students of School District 11 needed to consume 70,000 cases (or 1.68 million bottles) of Coke products in order to receive the full financial benefit of its exclusive agreement. Moreover, Coca-Cola products sold at cafeteria fountains did not count toward the "quota." In order to meet the 70,000-case requirement, Mr. Bushey sent a memo to all District 11 principals suggesting that they allow Coke products to be consumed during class and that they place vending machines in busier areas of their schools. He noted in the memo that "if 35,429 staff and students buy one Coke product every other day for a school year, we will double the required quota."[2]

This unfortunate and embarrassing situation perfectly illustrates two of the main problems school districts face when entering into exclusive commercial vending contracts, as well as commercial activities in general: (1) being "out-negotiated" by a vendor and (2) losing sight of what is best for the students and the district. Both of these problems can be overcome by a well-prepared school attorney. In fact, once the interests of the students are protected and the legal hurdles are overcome, such contracts can become a valuable source of funding for local education without adverse effect on students or district operations. The key for school boards and school attorneys to remember is that they have the bargaining power and the legal authority (indeed, the legal obligation) to take control of negotiations with vendors.

This article is intended to assist in preparing school attorneys for these situations by discussing: (1) the scope of this type of commercial activity in schools today; (2) the role of the school attorney in educating district officials as to the ethical, financial and practical concerns presented by exclusive vendor relationships; (3) the role of the attorney in helping school officials navigate through a maze of often complex state laws and regulations; (4) the role of the attorney in negotiating the final agreement reached between the parties; and (5) other emerging areas of new commercialism in the schools.

HOW WIDESPREAD ARE EXCLUSIVE VENDOR CONTRACTS WITH SCHOOLS?

According to a recent study done by the Director of the University of Wisconsin-Milwaukee's Center for the Analysis of Commercialism in Education (CACE), the fastest growing area of commercialism in our schools involves exclusive vendor agreements between school districts and beverage product suppliers

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[1] *See*, Constance L. Hays, "Today's Lesson: Soda Rights; Consultant Helps Schools Sell Themselves to Vendors," *New York Times* (May 21, 1999).

[2] Nadya Labi, "Classrooms for Sale," *Time* (April 19, 1999).

(primarily soft-drink manufacturers such as Pepsi and Coca-Cola).[3] "Beverage items" covered by these exclusive agreements generally encompass carbonated and non-carbonated artificially flavored drinks, packaged waters, sports drinks, fruit and/or vegetable juices, fruit and/or juice-containing drinks, and ready to drink tea products.

Alex Molnar, Professor of Education and the Director of CACE, writes that such exclusive agreements have increased 1,668% between 1990 and 1999. By way of example, the CACE noted that there were 46 exclusive agreements between vendors and schools located in 16 states in 1998. By July 1999, there were 150 such agreements with school districts located in 29 states.[4] The increase in these contracts is clearly part of an overall increase in commercial activities in schools and classrooms. In other words, if you haven't seen a vendor contract yet, you will.

THE ROLE OF THE SCHOOL BOARD ATTORNEY

The role of the school board attorney is really three-fold when it comes to counseling a client through the process of entering into a vendor contract.

- First and foremost, the attorney must educate the school officials on the policy considerations, both in favor of and against entering into such contracts. This requires the attorney to be conversant with the ethical considerations, underlying economic and demographic data and the potential financial impact of these arrangements. Attorneys should assist their clients to emerge from the deal feeling that they received a sensible arrangement and a fair share of the pie.
- Second, the attorney must help navigate the school through the practical and regulatory limitations on such activities.
- Third, the attorney should assist the district in taking control of the negotiations and contract formation process. (Throughout the discussion of the role of the school attorney, references will be made to vendor contracts for soft-drinks, or so-called "pouring and vending rights." However, many of the suggestions made here are applicable to other forms of exclusive vendor contracts as well.)

Attorney as Educator

After thoroughly researching the relevant literature and regulations, educating a district on the "ins and outs" of pouring and vending rights agreements can be accomplished through open and honest in-service programs aimed at addressing policy and ethical considerations associated with vendor contracts as well as the potential financial impact of such contracts on the district.

- **Policy Considerations**

Exploring the relevant policy considerations is the first area that should be addressed before a district decides to move forward with the process of soliciting exclusive agreements. Often, a discussion of these issues, which vary from health concerns to the role of business in the educational arena, will determine whether a district is willing to proceed with the solicitation process.

Given the exponential increase in exclusive pouring and vending rights agreements in the educational arena, most members of school communities have an opinion about his or her school district's involvement in this type of commercial venture. This rapid increase has prompted many to question the propriety and long term effects of these agreements on students. For example, the senior program director at the Center for Commercial-Free Public Education in Oakland, California has asked "Is it proper for public institutions to become salespeople and build brand loyalty?"[5] Other considerations include exclusivity's effect on the students' right to choose. For many, these agreements result in school employees and children becoming a captive audience for corporate giants. Then, of course, there are the health concerns. The arguments on this issue vary from "soda has no nutritional value" to "soda promotes obesity in school age children." It is the school attorney's role to alert the district to these concerns, not as an advocate for or against the agreement, but simply as an educator. A properly informed school district is the best defense against the vendor's savvy representatives. (For an excellent discussion about the dangers of commercialism in previously endorsement-free environments, such as non-profit associations, see "Whats in a Name? Public Trust, Profit and the Potential for Public Deception," a preliminary multi-state report on commercial/nonprofit product marketing prepared by the Attorney Generals of 16 states. It is available on the World Wide Web at http://www.ag.il.us/marketingreport.htm.)

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[3] Alex Molnar, "Cashing In on Kids" (August 1999), (http://www.uwm.edu/Dept/CACE/documents/cashinginonkids.html).

[4] *Id.*

[5] Labi, "Classrooms for Sale," *supra, n.2.*

- **Potential Financial Impact on the District**

While the objections and concerns surrounding exclusive pouring and vending agreements are often well-reasoned, the school attorney should also address the benefits of such agreements, as they are, in many cases, significant. Specifically, district officials should be made aware of all the economic components of such agreements. These components include:

1) "upfront" annual payments for exclusivity;
2) monthly/quarterly commission payments;
3) monies from recycling deposits (where applicable); and
4) administrative procurement fees.

The "upfront" payment for exclusivity represents the amount the vendor actually pays to the district for the right to be the exclusive beverage vendor in the district's buildings and other venues controlled by the district. Exclusivity is the real source of financial gain for school districts because vendors are willing to be extremely generous in order to remove the competition and earn the coveted position of exclusive vendor. Today, the "going rate" in New York for exclusivity alone can be computed at approximately $10.00 per student per year. A district with 9500 student should expect, at a minimum, to receive $95,000 a year solely in return for the right of exclusivity. A five year deal will net the district almost half a million dollars for this category alone.

A word [illegible]ution with regard to the upfront payments, however. When reviewing the offer, beware of upfront payments with "strings attached." For example, many of the early pouring and vending rights agreements attributed large sums of money to be paid to the district "upfront." A closer reading of these agreements revealed that the alleged exclusivity "upfront payment" was actually an *advance* on commissions. The money was only as good as the district's sales. If the district did not sell enough of the vendor's beverages to cover the advance in any given year, the district would be required to return the unearned portion of the money. It was this type of "string" which led to the problems that the Colorado Springs School District 11 experienced.

The second financial portion of the agreement is the commission payment based on the number of "vends." With solid bargaining considerations taken into account, the district should be obtaining, on average, between 33 to 50 percent of the net sales of all beverages vended at its facilities.

The last two economic elements of the agreement are revenue from the bottle deposits on beverages (where legally required) and the administrative procurement fee. With respect to the former, districts should be sure to secure the right to obtain the refunds of deposits for returned containers on the beverages vended in their facilities. The latter represents a one-time only fee provided by the vendor which may be sought and used by districts to cover their costs of research, in-service programs, negotiating, and drafting contract terms.

Note also that by entering into an exclusive pouring and vending rights agreement a district is taking steps to maximize its profits from what is oftentimes a pre-existing informal but nevertheless exclusive relationship. An overwhelming majority of schools already have soda and juice vending machines in their buildings. The arrangements with the vendor or vendors currently servicing the district's vending machines are likely financially one-sided. That is, it is unlikely that the district is receiving much of a commission on the sales of the beverages. In fact, some districts do not receive *any* commission revenue from the machines, although they may have received other "donated" goods, scoreboards or "scholarships."

It is important for school attorneys to encourage all districts interested in exploring the solicitation of exclusive pouring and vending rights agreements to consider both the pros and cons related to such agreements. Once a district works through the policy considerations and decides that the pros outweigh the cons, it is time to navigate them through the practical and regulatory conditions and limitations.

Attorney as State Law Navigator

In New York and many other states, there are a number of significant rules and restrictions on public school involvement with commercial activity in and around school. The basic rules seem clear, but when applied in practice there are questions and inconsistencies. *Remember, this is a developing area of the law — the rules may change on short notice.* (Since the bulk of the legal discussion contained in this section focuses on state law concerns, attorneys should carefully research their own state's laws to ascertain whether the principles discussed herein are applicable. This section will primarily focus on New York State law.)

• Prohibition on Gifts

Article VIII § 1 of the New York State Constitution prohibits a municipality or school district from making *a gift or loan* of public money. The provision reads as follows:

> No . . . school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking . . . ; nor shall any . . . school district give or loan its credit to or in aid of any individual, or private corporation or association, or private undertaking. . . .[6]

This provision comes into play because some proposed commercial transactions with schools appear to be giving or loaning public property for little, if any, value. Note that if there is adequate consideration, then the transaction is not a gift but an exchange for value.

An arm's length negotiation with a vendor, where the school district obtains a fair value for the arrangement, would not violate this constitutional provision.

• Use of District Property

Section 414 of the New York State Education Law *restricts the use of school property for non-school purposes,* including commercial activity. Section 414 states as follows:

> . . . . The . . . board of education may adopt reasonable regulations for the use of such schoolhouses, grounds and other property, all portions thereof, when not in use for school purposes or when the school is in use for school purposes if in the opinion of the . . . board of education the use will not be disruptive of normal school operations, for such other public purposes as are herein provided. . . .[7]

Commercial enterprises conducted on school property fall under this statute, generally requiring a public purpose and an activity that does not disrupt school operations. The board of education has discretion to grant or deny uses, consistent with its policy adopted under this statute.[8]

The New York State Commissioner of Education has stated a two-tier standard for deciding whether commercial activities are permissible at school:

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[6] New York State Constitution, Article VIII, § 1.

[7] N.Y. Education Law § 414(1).

[8] *See, e.g., Matter of Countryman,* 1 N.Y. Educ. Dept. Rep. 538 (1960).

- When the activity involves the sale of goods to students in school, unrelated to instruction, the activity must have a *school purpose*. This is intended to avoid exploitation of students and disruption of their education by commercial activities.

  Example: Sale of class rings, student pictures, soft drinks, etc.

- When the activity involves the sale of goods or services to the general public when school is not in session, the standard is *whether there is a public benefit in the use of public property by private parties*.

  Example: *Appeal of Erdberg* – a PTA flea market, professionally operated, with 25% of the gross going to the PTA resulting in $15,000 donated to the school.[9]

The Commissioner added in the *Erdberg* decision that "Public property may not be used solely for private benefit. However, an incidental benefit to a private interest does not invalidate a project or activity the primary purpose of which is public."[10] He contrasted this holding with his decision in *Matter of Bd. of Education, Buffalo CSD* where a teacher improperly used public school video production equipment to tape a private video for sale at a profit. There was no public purpose, and no part of the proceeds went to the school.[11]

While this is still a very grey area of the law, the distinction between public and private benefits seems to turn somewhat on the aggressiveness of the commercial activity. For example, a school district would be prohibited from endorsing or promoting a particular product or service, such as having an "Official Cola" of the school district. By contrast, passive advertising such as a product name on a scoreboard, or placement of a vending machine in school hallways, are permitted since students can effectively "opt out" of the activity. The Commissioner has also made clear that public employees — school teachers or other personnel — must not have a significant role in the commercial enterprise (at least on school time).[12]

Assuming a district properly avoids an outright product endorsement or an obligation to promote the goods, a pouring rights arrangement would be permissible under these rules since there is a school purpose for this arrangement, *i.e.* students will have the option of getting something other than water to drink.

- **Electronic Commercial Promotional Activity Prohibited**

Part 23 of the New York State Regents Rules forbids a school district from contracting to permit electronic commercial promotional activity on school premises. The rule reads as follows:

> Section 23.2 - Prohibition of commercial promotional activity in the public schools.
>
> Boards of education or their agents shall not enter into written or oral contracts, agreements or arrangements for which the consideration, in whole or in part, consists of a promise to permit commercial promotional activity on school premises, provided that nothing in this Part shall be construed as prohibiting commercial sponsorship of school activities.[13]

This rule draws a distinction between "commercial promotional activities" and "commercial sponsorship." "Commercial promotional activities" are defined as "any activity, designed to induce the purchase of a particular product or service by students, or to extol the benefits of such product or service to students for the purpose of making its purchase more attractive, that is conveyed to students electronically through such media as, but not limited to, television and radio."[14] For example, television commercials, such as those accompanying

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[9] 26 N.Y. Educ. Dept. Rep. 464 (1987). *See also Appeal of Gary Credit Corporation*, 26 N.Y. Educ. Dept. Rep. 414 (1987) (finding a school purpose for sale of class rings).

[10] *Erdberg, supra* at 467.

[11] 21 N.Y. Educ. Dept. Rep. 585 (1982).

[12] *Gary Credit, supra, n.9.*

[13] 8 NYCRR § 23.2.

Channel One broadcasts or beamed to student computers by Internet service providers such as ZapMe! Corp., are prohibited in New York public schools. (For a further discussion about Channel One and ZapMe!, see the section entitled "Other Commercial Activities in the Schoolhouse" below.)

"Commercial sponsorship" is defined as the "underwriting of an activity on school premises which does not involve the commercial promotion of a particular product or service." This appears to correspond loosely to the more "passive" forms of advertising discussed above.

In the standard pouring rights agreement, electronic commercial promotion is seldom an issue. Nevertheless, New York attorneys creating or reviewing such contracts are encouraged to include a provision requiring full compliance with this regulation, in order to avoid potential disputes with vendors throughout the term of the agreement.

- **Procurement Requirements — Bids and Quotes**

New York's General Municipal Law lays out extensive procedures to be followed by all school districts and municipalities when they purchase goods or services.[15]

The purposes stated for these provisions are:

1) to guard against favoritism, improvidence, extravagance, fraud and corruption;

2) to foster honest competition so that a political subdivision can obtain the best goods and services at the lowest price.

This statute requires public bidding of certain public contracts and requires school districts to adopt purchasing policies that govern all other purchases, and to include request for quotes procedures where bidding is not mandated.

> Goods and services which are not required by law to be procured by political subdivisions . . . pursuant to competitive bidding must be procured in a manner so as to assure the prudent and economical use of public moneys in the best interest of the taxpayers. . . , to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption. . . .[16]

As a general legal principle in New York, bidding statutes are not thought to apply to the award of concessions or franchises (as well as leases), essentially because the school district does not buy anything — does not expend its funds — but rather authorizes use of its property for sale to students or to the public in general.

Nevertheless, both the Commissioner of Education and municipal law theory anticipate that the concession or franchise will be awarded after a fair procedure designed to obtain the best advantage for the school district and to ensure equal opportunity to participate to the commercial competitors which may be interested.[17] Typically, a properly drawn request for proposals would be used for this purpose.

As noted below, this process allows for further even-handed negotiations after the proposals are received. This is where an attorney can assure that his/her district is obtaining the best financial deal possible.

- **Other Legal Restrictions**

Two relevant restrictions on a New York board of education's authority arise from general theories of municipal law. Although each is a "grey area" itself, they can limit or prevent action which might otherwise make eminent sense to board members.

- **Limited Powers Doctrines.** School districts and municipalities are creatures of statute. Since boards have only those

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[14] 8 NYCRR § 23.1(b).

[15] *See*, N.Y. Gen. Mun. Law Article 5-A, § 100ff.

[16] N.Y. Gen. Mun. Law § 104-b(1).

[17] *See Appeal of Weissman*, 28 N.Y. Educ. Dept. Rep. 566 (1989); Mitchell S. Morris, Research Paper, *Competitive Bidding Under General Municipal Law, Section 103*, 1982 Opinions of the N.Y.S. Comptroller 3029.

powers and authority granted by statute or necessarily implicit in the statute, it is important to find a school purpose or an appropriate public purpose for commercial activities.

- **Binding Future Boards Limitation.** Because board composition changes (or is subject to change) each year, a legal maxim holds that boards cannot bind the successor board in matters relating to governmental matters, unless a statute allows a longer-term decision. Thus it is important to include annual cancellation clauses or renewal provisions in vendor agreements.

Attorney as Negotiator

In New York, the process of negotiating a vendor contract usually should begin with a request for proposals ("RFP"). RFPs are appropriate for use in soliciting exclusive pouring and vending rights agreements because such agreements are not purchase contracts and appear more analogous to licenses or concession agreements. (A copy of relevant provisions from a sample RFP is found at Appendix A.) Use of the RFP process will "obtain the public benefits" state procurement statutes seek to ensure.

New York school districts range in size from under 500 students to more than 4 million. Particularly for smaller and medium size districts, the first consideration is whether to approach the RFP process as a single district or through a consortium of districts. Group cooperative action is authorized by New York General Municipal Law Article 5-G (Section 119-o) which states that:

> . . . municipal corporations and districts shall have the power to enter into, amend, cancel and terminate agreements for the performance . . . of their respective functions, powers and duties on a cooperative or contract basis . . . any agreement entered into hereunder shall be approved by each participating municipal corporation or district by a majority vote of the voting strength of its governing body.[18]

So far, experience has shown that districts within a particular geographic region have fared considerably better by banding together to participate in area-wide agreements. There seems to be less public opposition when, for example, most or all of the schools within a county choose to enter the arena together, on the same terms. Similarly, vendors are willing to invest much more in terms of financial incentives and rights fees when dealing with potential exclusive vending privileges for a larger market. Vendors certainly recognize the benefits of economy of scale and market share potential. That's their business!

- **Nature of the RFP**

An RFP should provide sufficient information to allow prospective beverage vendors to intelligently determine proposed exclusivity payments, commission rates, etc. and to do so on an equal footing with other vendors. Unlike a formal bid, however, the contract need not be awarded solely on the basis of the bid price. Moreover, there may be additional negotiations and clarification meetings conducted separately with proposed vendors to obtain more favorable terms after the proposals are received, as long as favoritism is avoided. The first proposal is generally far lower than what can be negotiated. (A copy of the progress of negotiations for a consortium of districts for a single county-wide exclusive vending contract can be found at Appendix B.)

When drafting an RFP for the solicitation of exclusive beverage pouring and vending rights agreements, districts should structure the document so as to retain a comfortable degree of control over the arrangement. For example, districts may choose to control the following areas by including sections that address these issues in the RFP:

- the number and placement of vending machines throughout their facilities;
- the types of beverages sold in the vending machines; and/or

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[18] N.Y. Gen. Mun. Law, § 119-o(1).

- the type and amount of vendor advertising (depending upon applicable policy considerations and regulatory limitations).

- **Recommended RFP Provisions**

The goal of the RFP is to obtain an economically rewarding proposal, while at the same time maintaining necessary control over the terms of the agreement. Remember, the provisions of the RFP will eventually be incorporated into the final agreement negotiated by the district and the selected vendor. (Provisions of a sample contract can be found at Appendix C.) In order to ensure that the district (or consortium of districts) maintains such control, there are several provisions that should be incorporated into any exclusive vendor RFP.

Purpose

The district should identify the type of contract it wishes to enter into (*i.e.*, exclusive beverage pouring and vending rights); and the types of items the contract will include (*i.e.*, the specific types of beverages included and/or excluded in the exclusivity agreement).

Exclusivity

The terms and scope of the exclusivity should be specifically set forth, including any "exemptions" such as food service vendors, pre-existing arrangements with booster clubs or teachers' lounge, that the district may wish to exclude from the coverage of the contract.

Termination

The vendor RFP should set forth the desired terms and conditions for termination of the agreement for cause or otherwise. In New York, the State Education Department requires that these agreements allow the board of education to terminate the agreement annually. This provision avoids the rule against binding future boards of education to the terms of a multi-year agreement.

Work Included

The scope of the work desired of the successful vendor, such as installing, maintaining, replacing, servicing and stocking the vending machines, should be specifically set forth in the RFP (for example, decide whether the vendor or the school custodian will do this work).

Vending and Fountain Equipment

This section should indicate the process of determining the placement and quantity of vending machines or fountains throughout the various school buildings and other venues controlled by the district; *i.e.*, by mutual agreement of the parties (a school district should never cede this authority to a vendor).

Recycling Program

The specific terms of a recycling program, if desired, should be included in the RFP. As discussed above, in those states with container deposit laws, the recycling program can serve as another source of revenue under the agreement.

Price Escalation Provision

A section of the RFP should indicate the terms of, or limitations on, any future price increases by the vendor. The best approaches to addressing future price increases are to require that any and all increases be by mutual agreement of the parties with requirements that the vendor provide justification for the proposed increase or, alternatively, to set forth a maximum percentage increase allowed.

Insurance

A section requiring the vendor to purchase extensive liability insurance naming the district as an insured is also desirable.

Statutory Compliance

A general statement of the vendor's obligation to comply with all applicable federal, state, and local laws and ordinances regarding contracts with school districts should also be included in the RFP. Make specific reference to any applicable laws, such as workers compensation, non-discrimination in employment, wage and hours laws, prevailing wage where applicable, health code compliance, etc. Also, set forth explicitly the district's limitations on promotional activities by the vendor.

Assigning or Subletting of Contract

The vendors should be informed that the agreement may not be sublet or assigned.

Indemnification and Hold Harmless

The RFP should include a provision stating that the vendor will defend, indemnify and hold harmless the district, its board of education, officers, employees and agents from its wrongful or negligent acts.

State and Federal Nutritional Guidelines

The vendors should be informed of the requirement that any agreement entered into must be in accordance with the various local, state and federal nutritional guidelines concerning product composition and accessibility for students and for the public in general.

Independent Contractors

The RFP should include a provision stating that the relationship between the vendor and the district is one of independent contractors. This characterization of the relationship between the parties is intended to insulate the district from liability for the actions of the vendor or its representatives.

Compliance with District Regulations

The RFP should include a provision alerting the vendors, and all persons working for them, that they are subject to the various district policies and regulations pertaining to conduct and building regulations (e.g., smoking prohibitions, ID badges, sign-in provisions, etc.).

Census Information

Each district participating in the RFP process should include its student and employee population, general attendance figures for events, as well as the number of buildings and other venues within the district. Including such information allows the potential vendors to analyze the profitability potential of the district. Vendor offers of payments under the proposals are based on student population and the expected or estimated potential for vend together with expectations of "value" based upon exclusivity and "brand loyalty potential."

- **Distribution of RFP**

The RFP should be forwarded to as wide a group of potential vendors as possible in the district's local area. These vendors may include local beverage distributors, wholesalers as well grocery stores or other outlets. The "Big Two" of the school district vending war, Coca-Cola and Pepsi-Cola, should not be the only vendors approached. In this regard, the district may also wish to place a legal notice in its official newspaper regarding its solicitation of exclusive beverage rights proposals.

- **Approval by Board of Education**

Of course, the board of education has the final decision with regard to entering into an exclusive beverage pouring and vending agreement. In New York, to be binding the agreement must be formally approved by a resolution of the board of education. With counseling from school attorneys savvy in the workings of exclusive pouring and vending rights agreements, boards of education across the United States can be sure that their districts are taking a positive step into the commercial arena.

OTHER COMMERCIAL ACTIVITIES IN THE SCHOOLHOUSE

The exclusive beverage vendor contract is only one form of schoolhouse commercialism. School attorneys should also be prepared to counsel their clients on an expanding range of commercial activities. The following is a discussion of the prevalence and growth of these other activities as well as the special problems they may present.

Electronic Marketing

Electronic marketing, which includes television, radio, and the Internet/World Wide Web, is a relatively new area of commercial activity in the schools. According to CACE, the number of schools taking part in such activity increased from 172 in 1995 to 674 in 1998-1999, an increase of 292%.[19] Between the school year 1997-98 and 1998-99, the number jumped 59%.[20] The rapid increase here suggests that electronic marketing in the schools may continue to expand substantially in the foreseeable future. To a considerable degree this increase is likely to be driven by companies similar to the ZapMe! Corporation, which offer schools computers and Internet/World Wide Web services in return for access to their students.

This category includes the now famous (or infamous, depending on one's perspective) Channel One. This company provides a ten-minute news broadcast supplemented by two minutes of commercials. It is offered primarily to middle, junior high and high school students. In addition to its television program, Channel One also offers an Internet Web site with related content. According to its Web site,[21] Channel One Network, a PRIMEDIA Inc. company, "is a learning community of 12,000 American middle, junior and high schools representing over 8 million students and 400,000 educators." According to PRIMEDIA's Web site:

> Each school that carries the Network receives $25,000 worth of equipment: a fixed KU-band satellite dish, two video cassette recorders, 19-inch color television monitors mounted in classrooms throughout the school and internal wiring, all of which is regularly serviced free of charge. In its first six years, Channel One Network installed more than $220 million worth of equipment in schools nationwide.[22]

PRIMEDIA also "encourages" schools to use the "free" equipment for other educational uses as well. To many school officials seeking to modernize their schools' teaching capabilities, two minutes of commercials each day does not seem much of a price to pay for the free equipment.

However, critics of Channel One argue that not only is the content of Channel One's programming of questionable value, there are a number of hidden costs associated with the "free service." A 1998 study by Professor Alex Molnar, director of CACE, and Max Sawicky, an economist with the Economic Policy Institute, found that taxpayers in the U.S. pay *$1.8 billion dollars per year* for the class time lost to Channel One.[23] Perhaps more importantly, this type of activity raises ethical concerns, such as: Who controls the curriculum? What kind of long-term effects will commercialism have on children? Are there freedom of speech ramifications?

Incentive Programs

According to the 1999 CACE study, incentive programs (such as General Mills' Box Tops for Education and Campbell's Soup Labels for Education), have grown rapidly during the past few years. Between 1990 and 1998-99 the number of incentive programs increased 83%. The increase between the 1997-98 and 1998-99 school years was 15%.[24]

These companies argue that their programs are largely philanthropic. Critics argue that they were established by marketers to collect demographic information about students and their parents and to build brand loyalty. Care should be taken to properly categorize the district's role as recipient of funds or donations, and not as endorsers or promoters of products.

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[19] Molnar, "Cashing In on Kids," *supra, n.3.*

[20] *Id.*

[21] *See,* http://www.channelone.com.

[22] http://www.primediainc.com.

[23] Molnar and Sawicky, "The Hidden Costs of Channel One," (April 1998) (http://www.uwm.edu/Dept/CACE/documents/hidden_costs2/html).

[24] Molnar, "Cashing In on Kids," *supra, n.3.*

Appropriation of Space

This type of activity involves situations similar to the recent McGraw-Hill math textbook controversy in California. Specifically, in April 1999, a California education committee voted to restrict the use of brand names in school textbooks. Parents were upset about a McGraw-Hill math textbook which used brand names in its problems (*e.g.* how many Volkswagen Beetles would it take to ...?). Although McGraw-Hill indicated that it was not paid for product placements, the inclusion of brand names in the text prompted the introduction of legislation in California that would prohibit adoption of ad-carrying textbooks.

According to CACE, appropriation of space also showed a sharp increase between 1997-98 and 1998-99. The number of incidents of this activity increased from 33 in 1990 to 122 in 1998-99.[25]

New York, along with other states, has enacted legislation which expressly prohibits advertising or other commercial promotion on school buses.

CONCLUSION

Exclusive vending agreements where permissible can be somewhat lucrative for school districts, especially in times of declining state aid and local revenue. When properly administered, such agreements protect against inappropriate promotional activities or "tie-ins" to endorsements by the district. School districts have both the bargaining power and a statutory obligation to maintain control over these agreements. Such control can assure that students are allowed to "opt out" of the commercial activity in question and that the school district gets a fair deal. As these types of arrangements and agreements become more prevalent, school attorneys should try to share financial information about these deals (to the extent possible) with other school attorneys in their area to assist each other to accurately assess whether their districts are obtaining fair financial arrangements with vendors and fair educational value for students.

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[25] *Id.*

APPENDIX A

[SAMPLE PROVISIONS]

____________ School District(s)

Request for Proposals
Exclusive Beverage Pouring and Vending Rights and Services

GENERAL CONDITIONS

ALL REQUESTS FOR PROPOSALS ISSUED BY THE SCHOOL DISTRICT SET FORTH BELOW WILL BIND INTERESTED PARTIES AND SUCCESSFUL INTERESTED PARTIES TO THE CONDITIONS AND REQUIREMENTS SET FORTH IN THESE GENERAL CONDITIONS, AND SUCH CONDITIONS SHALL FORM AN INTEGRAL PART OF THE CONTRACT TO BE AWARDED BY THE GROUP.

DEFINITIONS:

"District"	The ____________ Central/City School District(s)
"Proposal"	An offer to furnish services and materials in accordance with the request for proposal, the general conditions, and specifications.
"Proposal Form"	The form on which the Interested Party submits his/her proposal.
"Interested Party"	Any individual, company, or corporation submitting a proposal.
"Successful Interested Party"	Any Interested Party to whom an award is made by the Group. Such parties are also referred to as "Vendor".
"Specifications"	The description of materials, supplies and/or services requested.

PROPOSALS:

1) All proposals must be submitted in writing and in accordance with instructions provided by the District.

2) Proposals received after the time stated in the notice to Interested Parties may not be considered. Such proposals will be returned unopened to the Interested Party. The Interested Party assumes the risk of any delay in the mail or in the handling of the mail by employees of the District. Whether sent by mail or by means of personal delivery, the Interested Party assumes responsibility for having his proposal deposited on time at the place specified.

3) General and special instructions, in connection with each item against which a proposal is submitted, must be given to constitute a proposal.

4) The submission of a proposal will be construed to mean that the Interested Party is fully informed as to the extent and character of the supplies, materials, equipment, and service in complete compliance with the specifications.

5) No charge will be allowed for federal, state or municipal sales and excise taxes since

the District is exempt from such taxes. The proposal price shall be net and shall not include the amount of any such tax.

6) In all specifications, the words "or equal" are understood to follow each item description. The decision of the District as to whether an alternate or substitution is in fact "equal" shall be final.

7) Prices shall be net, including transportation and delivery charges, to the destinations indicated in the proposal. Title shall not pass until items have been delivered to and accepted by the District.

8) Under penalty of perjury, the Interested Party certifies that:

   (a) The proposal has been arrived at by the Interested Party independently and has been submitted without collusion with any other vendor of materials, supplies, or equipment of the type described in the invitation for proposals and,

   (b) The contents of the proposal have not been communicated by the Interested Party, nor, to the best of its knowledge and belief, by any of its employees or agents, to any person not an employee or agent of the Interested Party or its surety on any bond furnished herewith prior to the official opening of the proposal.

9) (Other general conditions)

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DETAILED SPECIFICATIONS PURCHASE OF BEVERAGE ITEM REQUIREMENTS WITH EXCLUSIVE POURING RIGHTS/VENDING LICENSE

INTENTION:

It is the intent of the District to contract with an Interested Party for the purchase of the District's requirements for beverage items including: carbonated and non-carbonated artificially flavored drinks, packaged waters, sports drinks, fruit and/or vegetable juices, fruit and/or juice containing drinks, and ready-to-drink tea products ("beverage items"), all as per the attached specifications. Note: the District reserves the right to except 4-ounce juices from the Contract.

As part of this Contract, the District will grant to the Successful Interested Party a license to "vend" and "pour" beverage items in all of its facilities at compensation to be quoted by the Interested Party as part of its proposal.

Except as otherwise noted, the pouring rights and vending license granted by this Contract are to be exclusive. The Interested Party shall quote, as part of its proposal, any and all forms of compensation it will provide to the District in return for this exclusivity.

EXCLUSIVE POURING AND VENDING RIGHTS:

The exclusive pouring/vending rights shall apply to all District facilities where the beverage items, as listed above, are sold. **(Set forth exclusions if applicable.)**

The District shall require all concessionaires, food service vendors, and booster clubs selling beverages at the District's facilities to purchase all products, cups and carbon dioxide directly from the Vendor. **(Set forth limitations or exclusions if applicable.)**

DURATION OF CONTRACT:

The duration of the Contract, subject to earlier termination as set forth herein, shall be a period of five (5) years from the date of execution. The District will entertain proposals for an additional five (5) year renewal term. Such proposals must set forth all terms, conditions and other relevant factors upon which the proposed renewal is offered.

WORK INCLUDED:

The Vendor shall furnish all labor, materials and equipment necessary to perform any services required by the Contract with direction from the District.

VENDING AND FOUNTAIN EQUIPMENT:

The exact locations, quantities and types of vending/fountain equipment to be placed throughout the District's facilities, including the type of product to be sold, will be determined by mutual agreement of both parties (or, if applicable, "by the District upon consultation with the successful vendor"). However, the Vendor may not alter and/or decrease in number the present location and quantity of vending machines at the District's various buildings and facilities at the time of execution of the Contract.

All costs to furnish, deliver, install, inventory, stock and repair all vending/fountain equipment placed in the District's facilities shall be borne solely and exclusively by the Vendor.

The Vendor shall establish a system for the reimbursement of monies lost in the vending equipment. The system shall include a scheduled date of reimbursement to occur at a minimum of once a week at the District's various buildings.

RECYCLING PROGRAM:

The proposal shall include all costs to furnish recycling containers to accommodate the anticipated number of empty beverage containers generated from the sale of beverage products at the District's facilities. The District shall have the right to redeem the beverage containers returned for recycling or, at its election, to have the Vendor do so. In the latter event, and for as long as State provides a redemption rate of $.___ cents per beverage container, the Vendor shall pay the District a recycling rebate of $.___ for each 24-pack case of beverage containers returned by the District. The recycling rebate shall be adjusted in accordance with the State redemption rates during the term of the Contract.

DOCUMENTS:

All Interested Parties are required to use the Proposal Form furnished by the District when submitting their proposals. Envelopes should be sealed when submitted, with the information requested on the face of the envelope, as set forth in the "Instructions to Interested Parties".

PERSONAL EXAMINATION:

Interested Parties are required to satisfy themselves, by personal examination and inspection of the sites upon prearranged appointment, as to both work involved and difficulties likely to be encountered in the performance of the Contract.

No plea of ignorance of conditions that exist, or that may hereafter exist, or of any condition or difficulties that may be encountered in the performance of the Contract as a result of the Vendor's failure to make the necessary examination and investigation, will be accepted as an excuse for any failure or omission on the part of the Vendor to fulfill in every respect all the requirements, specifications, etc; nor will same be accepted as a basis for any claim for extra compensation.

ESTIMATED QUANTITY:

As this is the first time that the District is soliciting proposals for this commodity, the exact quantity required is to be estimated by the Interested Party utilizing its expertise. Information is provided with these specifications regarding the District's facilities and number of students/staff to enable the Interested Party to make such an estimate. The District does not guarantee any specific amount and shall not be held responsible for any particular volume of purchase/sale. In any event, the Contract shall cover the District's requirements where more or less than the Vendor's estimated amount.

VEND AND POUR PRICES:

Each proposal shall clearly set forth the proposed "vend" and "pour" prices for all beverages included in the Contract. Each Interested Party shall indicate the proposed prices on the "Proposal Form" provided and state whether the prices include the beverage container deposit cost, where applicable.

PRICE ESCALATION CLAUSE:

In the event that the Vendor's supplier or manufacturer increases the price of the item(s) to be supplied hereunder during the term of this Contract, such increases only may be passed on to the District. At the time of request, the Vendor must furnish written substantiation of increase by its supplier/manufacturer to the Purchase Officer. Said substantiation shall be in the form of invoices, receipts and/or other appropriate documentation showing costs in effect at the time of proposal versus cost in effect at the time of the request for price escalation. Any price increase must be substantiated to the satisfaction of the District and shall only be effective upon acceptance by the District in writing. No increase in overhead and/or profit to the Vendor will be allowed. **(If applicable, add the following: In no event shall the total increase in price for any goods under the agreement exceed __% during the term of the agreement.)**

"Overhead" for the purposes of the Contract shall be defined as the cost to the Vendor of doing business including, but not limited to, rent, utilities, mortgage, payments, taxes, transportation and labor, etc.

ACCOUNTING:

A separate accounting record will be kept for each location and shall separately designate the revenue, sales and associated expenses for each unit and/or point of sale.

AUDITING:

The proposal shall acknowledge the District's legal right to conduct an appropriate audit of the books and records maintained by the Vendor in connection with the goods and services provided under the agreement with the District.

DELIVERY:

See attached list of District delivery locations.

SAMPLES:

The Interested Party shall submit, if requested to do so by the District, samples of the items it intends to furnish under the Contract. Samples shall be submitted under separate cover at the time of proposal. Samples that are not claimed within forty-five (45) days of proposal opening will be considered as property of the District.

MATERIAL LISTED:

Each Interested Party shall submit, in spaces provided, the exact names of the various items it is submitting proposals on. Items shall be clearly marked and fully describe any variations from that specified.

INSURANCE:

The Vendor, at its sole cost and expense, shall obtain and maintain a General Commercial Liability Insurance policy, which includes coverage for contractual liability, products liability and completed operations and property damages, in an amount not less than $2,000,000 for each claim and $4,000,000 for each occurrence during the Term, and an automobile liability insurance policy covering owned, non-owned, and hired vehicles with coverage at $2,000,000 combined single limit. The Vendor will also keep in force and effect throughout the Term workers' compensation insurance to the extent required by law. A certificate or certificates of insurance evidencing the Vendor's insurance coverage and naming the District as an additional insured shall be delivered to the District upon execution of the Contract.

INDEMNIFICATION AND HOLD HARMLESS:

The Vendor shall indemnify and hold harmless the District and its Boards of Education, officers, employees, agents, representatives and volunteers from all suits, actions, losses, damages, claims, or liability of any character, type, or description, including but not limited to, all expenses of litigation, courts costs, penalties, and attorneys' fees whatsoever of any kind or nature, arising directly or indirectly from the negligence of the Vendor, its agents, servants, employees, persons or entities engaged as independent contractors by the Vendor and suppliers, provided, however, that the Vendor shall not be required to indemnify for the following:

(a) acts or conduct by third parties, other than the District and its Boards of Education, officers, employees, agents, representatives and volunteers, not under the control of the Vendor, except for persons or entities engaged as independent contractors by the Vendor;

(b) claims where the District has failed to give adequate, prompt written notice thereof to the Vendor;

(c) claims settled without the prior written consent of the Vendor; or

(d) acts of intentional misconduct or negligence by the party to be indemnified.

STATE AND FEDERAL NUTRITIONAL GUIDELINES:

Interested Parties are informed that any agreement resulting from these specifications must be in accordance with all rules and regulations concerning product selection, machine accessibility, etc., as set forth by the District and/or in accordance with all applicable State and Federal nutritional guidelines. (See Attachment "A")

COMPLIANCE WITH STATE BOARD OF REGENTS REGULATIONS:

The Vendor shall also be required to conform to the New York State Board of Regents' regulations relating to commercialism in public schools. (8 N.Y.C.R.R. § 23.1, 23.2) These regulations provide that:

> Boards of education or their agents shall not enter into written or oral contracts, agreements or arrangements for which the consideration, in whole or in part, consists of a promise to permit commercial promotional activity on school premises, provided that nothing . . . shall be construed as prohibiting commercial sponsorship of school activities.

"Commercial promotional activity" is defined as

> any activity, designed to induce the purchase of a particular product or service by students, or to extol the benefits of such product or service to students for the purpose of making its purchase more attractive, that is conveyed to students electronically through such media as, but not limited to, television and radio.

"Commercial sponsorship" is defined as

> the sponsorship or the underwriting of an activity on school premises which does not involve the commercial promotion of a particular product or service.

"School premises" is defined as

> any real property, school vehicle or facility under the control of a local board of education where access to school children may be had by virtue of their attendance at school, including but not limited to school buildings, school buses and school grounds.

CONFLICT OF INTEREST:

The Vendor hereby covenants and agrees that there is no officer or employee of the District forbidden by law to be interested in the Contract, either directly or indirectly, who will benefit therefrom.

INDEPENDENT CONTRACTORS:

The District and the Vendor are independent of one another and shall have no other relationship. Neither party shall have, or hold itself out as having, the right or authority to bind or create liability for the other by its intentional or negligent act or omission, or to make any contract or otherwise assume any obligation or responsibility in the name of or on behalf of the other party.

GOVERNING LAW:

The Contract shall be governed by and construed in accordance with the laws of the State of New York. Any litigation or other proceeding arising under the Contract shall be commenced in a court of appropriate subject matter jurisdiction in the State of New York with venue in ____________ County.

COMPLIANCE WITH DISTRICT REGULATIONS:

The Vendor shall cause all persons performing work to comply with all instructions pertaining to conduct and building regulations issued by the District. All such persons shall wear readily visible identification mutually satisfactory to the District and the Vendor.

The Vendor shall cause all such persons to preserve and protect all confidential information of the District to which they may have access during the performance of work. The District may promulgate and modify the rules and regulations relating to the conduct of the Vendor and all persons performing work under the Contract as the District, in its sole discretion, may determine. The Vendor shall cause all persons performing work to comply with such modifications.

MATERIAL SAFETY DATA SHEETS:

Material Safety Data Sheets are required for all Hazardous and Toxic substances.

ADDITIONAL INFORMATION:

Should an Interested Party require additional information with regard to the goods and services requested in this proposal or the terms and conditions of same, he/she should contact:

[List contact information] Any and all changes to these specifications are valid only if they are inserted into the General Conditions or Specifications by a written addendum to All Interested Parties.

District Census Information

1. The District has approximately _______ students.
2. The District employs approximately _______ full and part-time faculty and staff.
3. The District operates approximately _________ (__) buildings, including school and administrative buildings and bus garages.
4. The District allows extensive public use of its properties.

DELIVERY LOCATIONS

[List the Locations]

ATTACHMENT "A"

New York Education Law, Section 915:

Prohibiting the sale of certain sweetened foods

From the beginning of the school day until the end of the last scheduled meal period, no sweetened soda water, no chewing gum, no candy including hard candy, jellies, gums, marshmallow candies, fondant, licorice, spun candy and candy coated popcorn, and no water ices except those which contain fruit or fruit juices, shall be sold in any public school within the state.

APPENDIX B

_______________ Consortium:
(Student Population: 21,300)

Evaluation of Pouring and Vending Rights Proposals

	Vendor A's Proposal	Vendor B's Proposal
FIRST OFFER		
A. Commission	**31%** of net sales	**approx. 33%** of net sales
B. Upfront Payment for Exclusivity	**$55,000 per year**	**$59,000 per year**
SECOND OFFER		
A. Commission	**35%** of first 635,300 vends **50%** of all additional vends	**same as above**
B. Upfront Payment for Exclusivity	**$185,300 per year**	**$145,000 per year**
THIRD OFFER		
A. Commission	**38%** of first 635,300 vends **50%** of all additional vends	**same as above**
B. Upfront Payment for Exclusivity	**$213,000 yrs. 1-5** approximately **$10.00 per student** **$229,000 yrs. 6-10** - approximately **$10.75 per student***	**$200,000 per year** approximately **$9.39 per student**

* The amount per student will increase to $10.75 for yrs. 6-10 if the Districts meet or exceed 635,300 vends in the 5th year.

APPENDIX C

SAMPLE CONSORTIUM VENDING AGREEMENT
[Selected Provisions]

THIS AGREEMENT is made and entered into as of this _____ day of ___________, 2000, by and between ___________________________ with offices at _________________ ("______") and the _______________ **Consortium**, on behalf of certain listed participant school districts/BOCES ("Participants").

WITNESSETH:

WHEREAS, Article 5-G of the New York General Municipal Law authorizes municipal corporations to enter into cooperative agreements for the performance of those functions or activities in which they could engage individually; and

WHEREAS, Section 119-n(a) of the New York General Municipal Law defines the term "municipal corporation" as used therein as including a city, a town, a village, a board of cooperative educational services, or a school district; and

WHEREAS, each of the Participants is a "municipal corporation" as defined above; and

WHEREAS, the Participants hereto have by separate agreement set forth their various rights, duties and responsibilities into an Agreement pursuant to Article 5-G of the New York General Municipal Law and established the ___________________________ Consortium (hereinafter referred to as the "Consortium") in order to contract for an exclusive beverage pouring and vending rights agreement which shall apply to the participating districts; and

WHEREAS, _______________ desires the right to be the exclusive supplier of beverages to the Participants in the Consortium.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties hereto agree as follows:

I. DEFINITIONS.

"Beverages"	Carbonated and non-carbonated artificially flavored drinks, packaged waters, sports drinks, fruit and/or vegetable juices, fruit and/or juice containing drinks, and ready-to-drink tea products. Note: the Consortium reserves the right to exclude 4-ounce juices from the Agreement.
"Consortium"	Board of Cooperative Educational Services (BOCES) and the following signatory school districts:

1) __________ Central School District
2) __________ Central School District
3) __________ Central School District
4) __________ Central School District
5) __________ Central School District
6) __________ Central School District
7) __________ Central School District
8) __________ Central School District

"Term"	The period from ____, 2000 through _______, 2005.
"Renewal Term"	The period from ________, 2006 through _________, 2010.
"Vend"	The sale of one unit of Vendor product as noted herein.
"Vendor"	____________________, Inc.

II. APPLICATION OF EXCLUSIVE BEVERAGE POURING AND VENDING RIGHTS.

The exclusive pouring/vending rights granted herein shall apply to all Participant facilities where the beverage items, as listed herein, are sold.

Each Participant within the Consortium shall require its concessionaires, food service vendors, and booster clubs selling beverages at the Participant's facilities to utilize all products, cups and carbon dioxide supplied by the Vendor.

III. DURATION OF AGREEMENT.

The term of this Agreement shall be five (5) years, beginning _________, 2000 ("Term"), unless sooner terminated as provided herein. This Agreement may be renewed for an additional five (5) year term. The minimum conditions for renewal consideration are as follows:

(a) satisfactory performance by the Vendor respective to all terms and conditions of the Agreement; and

(b) payments made according to the schedule provided in Appendix "C" of the Agreement.

Should the Vendor satisfy the conditions referenced above, this Agreement may be renewed by the Consortium subject to review by the Consortium and adoption by the Participants in the discretion of each Participants' Board of Education.

In the event the Agreement is not renewed, all Vendor equipment, machines and supplies will be removed from the Participants' various premises and adjustments made, based upon an accounting, for remaining Vendor product at such premises.

IV. EXCLUSIVE BEVERAGE AVAILABILITY RIGHTS.

The Consortium, on behalf of the Participants, hereby grants to Vendor the following exclusive Beverage availability rights:

Vendor shall have the exclusive right to make Beverages available for sale and distribution at all buildings and facilities owned by the Participants, including the exclusive rights to install and operate all equipment that dispenses Beverages from any location, and subject to limitations herein provided, offer Fruit Drinks, packaged waters and other Products in cafeteria lines of the schools of the Participants if such Products comply with all nutrition rules and regulations to which the Participants are subject, and provide all Beverages sold at athletic contests, booster club activities, and all other community events sponsored by the Participants.

Vendor shall have the exclusive right to install full service vending machines ("Vending Machines") throughout the Participants' facilities at mutually agreed upon locations. Vendor shall have the further right to install additional Vending Machines in buildings and facilities acquired and/or constructed by the Participants during the term of this Agreement. Vendor shall install the vending machines at its sole expense. The number of vending machines to be installed within each school or other facility shall be mutually agreed upon by the Vendor and the Participants. Vendor shall have the right to place full trademark panels on all sides of its Vending Machines and other dispensing equipment so long as such items are in compliance with applicable rules and regulations regarding appropriate promotional and advertising activities.

V. REPRESENTATIONS, WARRANTIES AND COVENANTS OF THE PARTICIPANTS.

The Participants represent, warrant and covenant to Vendor as follows:

Binding Agreement. All necessary approvals for the execution, delivery and performance of this Agreement by the Consortium on behalf of the Participants have been obtained, and this Agreement has been duly executed and delivered by the Consortium and constitutes a legal and binding obligation of the Participants enforceable in accordance with its terms.

No Conflict With Other Agreements. No Participant in the Consortium, during the term of this Agreement, will enter into (i) any other agreements which would prevent it from fully complying with the provisions of this Agreement, or (ii) any agreement granting Beverage availability and/or other rights that are inconsistent with the rights granted to Vendor pursuant to this Agreement.

Survival. The Participants' representations, warranties and covenants contained herein shall survive the execution, delivery and, if appropriate, the termination of this Agreement.

VI. REPRESENTATIONS, WARRANTIES AND COVENANTS OF VENDOR.

Vendor represents, warrants and covenants to the Consortium and its Participants as follows:

Binding Agreement. All necessary approvals for the execution, delivery and performance of this Agreement by Vendor have been obtained, and this Agreement has been duly executed and delivered by Vendor and constitutes the legal and binding obligation of Vendor enforceable in accordance with its terms.

No Conflict With Other Agreements. Vendor has not entered into, and during the Term, will not enter into, any other agreements which would prevent it from fully complying with the provisions of this Agreement.

Survival. The Vendor's representations, warranties and covenants contained herein shall survive the execution, delivery and, if appropriate, the termination of this Agreement.

VII. CONSIDERATION.

A. *Pouring/Vending License:*

In consideration for providing the Vendor with the pouring/vending license set forth in this agreement, the Vendor shall pay the Consortium a commission of 38% on the monies collected (less sales tax and recycling refunds where applicable) from the first 635,300 vends and 50% of the monies collected (less sales tax and recycling refunds where applicable) from any additional vends sold during the term of this Agreement.

The Commissions earned for each calendar month during the Term will be calculated by the Vendor. On or before the fifteenth day of each month in each year of the Term, Vendor shall provide the Consortium with a written notice separated and identified for each participant, containing the monthly gross sales of vended Products for the prior month, together with the monthly and cumulative Commissions accrued with respect to such sales (the "Commission Calculation"), and a check payable to the Consortium for any and all Commission accrued but not yet paid. The Commissions shall be calculated according to the accounts and records of Vendor, subject to correction of errors upon examination by the Consortium and/or its Participants.

Vendor shall maintain accurate and complete records related to this Agreement, including but not limited to, the monthly commission calculations for each Participant. Vendor shall, upon reasonable notice, make the records available during normal business hours to the Consortium at Vendor's office set forth above. Upon examination of Vendor's records, any deficiency in the payment of Commissions shall be paid by Vendor to the Consortium within thirty (30) days of the notification to Vendor of such deficiency. Vendor shall maintain all records relative to this Agreement for a period of three (3) years from the close of each year's operation.

B. *Vendor Exclusivity*

As consideration for the status of exclusive vendor, the Vendor will pay to the Consortium two hundred two thousand eight hundred and thirty dollars ($202,830.00) per year for years one (1) through five (5) (the"Initial Term"). The Vendor shall pay two hundred seventeen thousand six hundred eighty-seven dollars ($217,687.00) for years six (6) through ten (10) (the "Renewal Term"), should the Participants' vends meet or exceed six hundred thirty five thousand three hundred (635,300) vends in year five (5). In the event that the vends do not meet or exceed the volume noted above, the exclusivity payment shall remain at two hundred thirteen thousand three hundred and thirty dollars ($213,330.00) for the renewal of the Term.

The first annual payment shall be due and payable within thirty (30) days of the execution of this Agreement and subsequent annual payments due upon the first day of each subsequent year of the Term. See Appendix "A" for the formula and disbursement of the upfront payment for exclusivity.

The Participants and Vendor agree to adjust the payment for exclusivity on a per capita basis in the event that student enrollment in or among the Participant districts increases by ten percent (10%).

C. *Administrative Procurement Fee*

The Vendor agrees to provide the Consortium with a one time only payment of nine thousand four hundred dollars ($9,400.00) which will be used by the Participants to offset some of their expenses associated with the development of specifications, negotiations and drafting agreements for exclusive pouring and vending rights. The administrative procurement fee shall be due and payable within thirty (30) days of the execution of this Agreement.

VIII. RETENTION OF RIGHTS.

The Consortium and its Participants shall not obtain by virtue of this Agreement, any right, title or interest in the trademarks of the Vendor, nor shall this Agreement give the Consortium or its Participants the right to use, refer to, or incorporate in marketing or other materials the name, logos, trademarks or copyrights of the Vendor.

IX. OUTSIDE CONDITIONS.

The Vendor shall not be held responsible for any resulting losses if the fulfillment of the terms of the Agreement shall be delayed or prevented by wars, acts of enemies, fires, floods, acts of God, or for any other acts not within the control of the Vendor and which by the exercise of reasonable diligence is not preventable.

X. WORK INCLUDED.

The Vendor shall furnish all labor, materials and equipment necessary to perform any services required by the Agreement with direction from the Consortium on behalf of its Participants.

XI. VENDING AND FOUNTAIN EQUIPMENT.

The exact locations, quantities and types of vending/fountain equipment to be placed throughout the Participants' facilities, including the type of product to be sold therein, will be determined by mutual agreement of the Vendor and Participant. However, the Vendor may not alter and/or modify in number the present location and quantity of vending machines at the Participants' various buildings and facilities at the time of execution of the Agreement, except by permission of the affected Participant.

All costs and expenses to furnish, deliver, install, inventory, stock and repair all vending/fountain equipment placed in the Participants' facilities shall be borne solely and exclusively by the Vendor.

XII. RECYCLING PROGRAM.

The Vendor agrees to bear all costs and expenses to furnish recycling containers to accommodate the anticipated number of empty beverage containers generated from the sale of beverage products at the Participants' facilities. The Consortium shall have the right to redeem the beverage containers returned for recycling or, at each Participant's election, to have the Vendor do so. In the latter event, and for as long as New York State provides a redemption rate of $.05 cents per beverage container, the Vendor shall pay the Consortium, for the benefit of each Participant, a recycling rebate of $1.20 for each 24-pack case of beverage containers returned by the Consortium. The recycling rebate shall be adjusted in accordance with the State redemption rates during the term of the Agreement.

XIII. PERFORMANCE OF SERVICE.

A. All material delivered to the Participants' sites must be accepted by the appropriate district administrator or his or her designee before being installed or placed. Rejected material must be promptly removed from the premises and replaced by satisfactory material.

B. The Vendor shall obtain and pay for all permits and licenses needed to perform the services under this Agreement in strict compliance with all laws and ordinances applying, including the New York State Department of Labor requirements and prevailing wage laws of the State of New York.

C. The Vendor also covenants and agrees to comply in all respects with all Federal, State and Local laws and ordinances regarding services for municipal corporations including but not limited to Workers' Compensation and Employers' Liability insurance, hours of employment, wages and human rights, applicable licensing requirements, and in accordance with sound engineering and safety practices.

D. The Vendor shall maintain adequate protection of on-site material and equipment so that work is completed without damage to the buildings, site, or equipment of the school or the Vendor. Any damage caused by the Vendor or the Vendor's employees shall be repaired or replaced by the Vendor.

E. The Participants' premises at all times shall be kept free from rubbish or waste material caused by the Vendor's employees or work. Work will not be accepted as satisfactory until site has been made clean and ready for use.

F. Should any tests be necessary, i.e. electrical testing related to the installation of distribution equipment, such tests shall be conducted in the presence of the appropriate district administrator. The Vendor shall pay all costs and expenses of conducting such tests.

XIV. VEND AND POUR PRICES.

"Pour" prices for all beverages included in the Agreement shall be at rates determined by the Consortium on behalf of the Participants. "Vend" prices shall be as determined by Vendor and current rates are as set forth in Appendix "B". Should a Participant(s) request a vend price for any unit within its properties/facilities which is lower than the vend price set forth in Appendix "B" for such beverage items, the Participant's commission rate for such vended beverages shall be reduced on a pro-rata basis to reflect such unit sales at the reduced vend price.

XV. PRICE ESCALATION.

During the term of this Agreement the Vendor guarantees that the vend prices for all beverages will not be increased more than 5% without the Consortium's consent.

XVI. ACCOUNTING.

A separate accounting record shall be kept for each beverage vending and pouring location at each Participant's site and shall separately designate the revenue, sales and associated expenses for each unit and/or point of sale.

XVII. AUDITING.

The Vendor shall acknowledge the Consortium's legal right to conduct an appropriate audit of the books and records maintained by the Vendor in connection with the goods and services provided under this Agreement.

XVIII. DELIVERY LOCATIONS.

Appendix "B" lists the delivery locations for each Participant.

XIX. INSURANCE.

The Vendor, at its sole cost and expense, shall obtain and maintain a General Commercial Liability Insurance policy, which includes coverage for contractual liability, products liability and completed operations and property damages, in an amount not less than $3,000,000 for each claim and $5,000,000 for each occurrence during the Term, and an automobile liability insurance policy covering owned, non-owned, and hired vehicles with coverage at $3,000,000 combined single limit. The Vendor shall also keep in force and effect throughout the Term workers' compensation insurance to the extent required by law. A certificate or certificates of insurance evidencing the Vendor's insurance coverage and naming the Consortium and its Participants as an additional insured shall be delivered to the Consortium upon execution of the Agreement.

XX. INDEMNIFICATION AND HOLD HARMLESS.

The Vendor shall indemnify and hold harmless the Consortium, its Participants, together with their Boards of Education, officers, employees, agents, representatives and volunteers from all suits, actions, losses, damages, claims, or liability of any character, type, or description, including but not limited to, all expenses of litigation, court costs, penalties, and attorneys' fees whatsoever of any kind or nature, arising directly or indirectly from the negligence of the Vendor, its agents, servants, employees, persons or entities engaged as independent contractors by the Vendor and suppliers, provided, however, that the Vendor shall not be required to indemnify for the following:

(a) claims where the Consortium has failed to give adequate, prompt written notice thereof to the Vendor;

(b) claims settled without the prior written consent of the Vendor; or

(c) acts of intentional misconduct or negligence by the party to be indemnified.

XXI. FEDERAL AND STATE NUTRITIONAL GUIDELINES.

Vendor's product and vending equipment at each Participant's locations shall meet all rules and regulations concerning product selection, machine accessibility, etc., as set forth by the Consortium and/or in accordance with all applicable State and Federal nutritional guidelines.

XXII. COMPLIANCE WITH STATE BOARD OF REGENTS' REGULATIONS.

Vendor shall at all times and at all locations under this Agreement conform to the New York State Board of Regents' regulations relating to commercialism in public schools. (8 N.Y.C.R.R. § 23.1, 23.2) These regulations provide that:

Boards of education or their agents shall not enter into written or oral contracts, agreements or arrangements for which the consideration, in whole or in part, consists of a promise to permit commercial promotional activity on school premises, provided that nothing . . . shall be construed as prohibiting commercial sponsorship of school activities.

"Commercial promotional activity" is defined as

any activity, designed to induce the purchase of a particular product or service by students, or to extol the benefits of such product or service to students for the purpose of making its purchase more attractive, that is conveyed to students electronically through such media as, but not limited to, television and radio.

"Commercial sponsorship" is defined as

the sponsorship or the underwriting of an activity on school premises which does not involve the commercial promotion of a particular product or service.

"School premises" is defined as

any real property, school vehicle or facility under the control of a local board of education where access to school children may be had by virtue of their attendance at school, including but not limited to school buildings, school buses and school grounds.

XXIII. INDEPENDENT CONTRACTORS.

The Consortium, its Participants, and the Vendor are independent of one another and shall have no other relationship. No party shall have, or hold itself out as having, the right or authority to bind or create liability for the other by its intentional or negligent act or omission, or to make any contract or otherwise assume any obligation or responsibility in the name of or on behalf of the other party.

XXIV. GOVERNING LAW.

The Agreement shall be governed by and construed in accordance with the laws of the State of New York. Any litigation or other proceeding arising under the Contract shall be commenced in a court of appropriate subject matter jurisdiction in the State of New York with venue in ______ County.

XXV. COMPLIANCE WITH DISTRICT REGULATIONS.

The Vendor shall cause all persons performing work to comply with all instructions pertaining to conduct and building regulations issued by the Participants. All such persons shall wear readily visible identification mutually satisfactory to the Consortium and the Vendor.

The Vendor shall cause all such persons to preserve and protect all confidential information of the Consortium and its Participants to which it may have access during the performance of the services specified herein.

The Consortium may promulgate and modify the rules and regulations relating to the conduct of the Vendor and all persons performing work under the Agreement as the Consortium, in its sole discretion, may determine. To the extent any such promulgation or modification results in a material change in the terms of this Agreement, the parties agree that this Agreement shall govern. The Vendor shall cause all persons performing work to comply with such modifications.

Under no circumstances shall the Vendor be permitted to express or imply in any fashion whatsoever that its products have received the endorsement of the District or that the District is, in any fashion, promoting or encouraging the products' purchase or use by its students, employees or others who may enter upon the premises of the District.

XXVI. MATERIAL SAFETY DATA SHEETS.

The Vendor shall supply to the Consortium, with a copy to the Participants, Material Safety Data Sheets for all Hazardous and Toxic substances.

XXVII. TERMINATION.

If (1) any of the Products are not made available as required in this Agreement to the Participants, their agents or concessionaires; (2) any of the rights granted to Vendor herein are materially restricted or limited during the term of this Agreement; or (3) a final judicial opinion or governmental regulation prohibits the availability of Beverages, whether or not due to a cause beyond the reasonable control of the Consortium, then Vendor may give the Participant(s), with a copy to the Consortium, written notice of such event and the Participant(s) shall have a thirty (30) day period within which to cure. If the event continues or is not cured, or is not curable, Vendor may elect, at its option, in addition to any other rights it may have at law or equity to:

(i) terminate this Agreement as it relates to the defaulting Participant(s); and

(ii) adjust the Commissions for the then remaining portion of the Term to reflect the diminution of the value of the rights granted to Vendor by this Agreement and receive a pro-rated portion of any amounts paid under Section VII(b).

In the event Vendor elects to exercise its right to adjust the Commissions as provided in subparagraph (ii) above, the Consortium may, at its option, within ten (10) days following receipt of notice of any Adjustment, notify Vendor of its disagreement with the amount of the Adjustment. The parties shall then attempt in good faith to resolve the disagreement over such Adjustment. If the parties cannot, after good faith negotiations, resolve the matter, Vendor may exercise the right of termination described in subparagraph (i) above.

The Consortium may terminate this Agreement for any breach of this Agreement's material terms by Vendor. The Consortium shall provide the Vendor with written notice of the breach and provide a thirty (30) day opportunity for Vendor to cure such breach. If Vendor fails to cure the breach within the thirty (30) day period, the Consortium, on behalf of its Participant(s), may immediately terminate the Agreement upon written notice to Vendor.

The Participants' Boards of Education have determined that it is in the best interests of each Participant to enter into this Agreement and to grant the exclusive rights set forth in this Agreement for a period of five (5) years with a five (5) year renewal term. The Participants acknowledge, however, that each Board's authority to bind future Boards may hereafter be challenged. For that reason, Vendor agrees that each Board may annually, after (include a date after conclusion of first year of the agreement, i.e. September 30, 2000), terminate this Agreement with respect to its District upon one hundred twenty (120) days written notice to the Vendor, provided that the Vendor is given at least twenty (20) business days written notice of the fact that such Board will consider possible termination of this Agreement and provided further that the Vendor is afforded the opportunity for a hearing before the Board to discuss the reasons for the possible termination and to present information and arguments concerning the benefits of continuing the agreement.

Further, the parties agree that in the event a Participant(s), by virtue of Board of Education action noted above, terminates its participation during any school year covered by this Agreement, such Participant(s) shall refund the Vendor the pro-rated portion of said Participant(s) exclusivity payment as referenced in Section VII B. of the Agreement, if any, received for such school year from the Vendor. Such refund to the Vendor shall be made within thirty (30) days of the termination of the Participant(s) participation in the Agreement. For example, if the Participant had received $6,000.00 in exclusivity payments for the school year and terminated its participation six (6) months into the school year, it shall refund one-half ($3,000.00) of the exclusivity payment.

XXVIII. SEXUAL HARASSMENT.

Federal law and the policies of the Participants prohibit sexual harassment of Participants' employees and students. Sexual harassment includes any unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature that creates a hostile or offensive working environment for the Participants' employees or students. Vendor and its contractors, subcontractors and suppliers shall exercise control over its and their employees so as to prohibit acts of sexual harassment of the Participants' employees or students. In the event the Participant(s), in its judgment, determines that Vendor or any person associated with Vendor's performance of this Agreement has committed an act of sexual harassment, Vendor shall cause such person to be removed from the Campus and shall take such other action as may be reasonably necessary to cause the sexual harassment to cease.

XXVIX. SMOKING POLICY.

The Participants' facilities are smoke-free. No smoking or other use of tobacco products is allowed on any property owned by the Participants. Vendor shall fully comply with this smoke-free policy.

XXX. DRUG FREE WORKPLACE.

Neither Vendor nor any employee of Vendor shall engage in the unlawful distribution, possession, or use of a controlled substance while performing any activity covered by this Agreement. The Participants reserve the right to request a copy of Vendor's Drug Free Workplace Policy. Vendor shall insert a provision similar to this section in all subcontracts for services to be performed pursuant to this Agreement.

XXXI. INJUNCTIVE RELIEF.

It is understood that the rights granted to Vendor in this Agreement are special, unique and extraordinary, and are of peculiar value, the loss of which cannot be fully compensated by damages in an action at law or any application of any of the other remedies described herein. Accordingly, in the event the Products are not made available as provided in this Agreement or if any of the provisions concerning Competitive Products are not complied with, the Participants acknowledge and agree that Vendor shall be entitled to seek and obtain equitable relief including an injunction requiring the Participant(s) to comply fully with its obligations under this Agreement to the extent permitted by law.

XXXII. THEFT OR DAMAGE.

The Participants shall not be responsible for, and Vendor shall assume all risk of, any theft, damage or destruction of any goods, merchandise, fixtures, equipment or other property belonging to Vendor or any person employed by or conducting business with Vendor, or kept, stored or located at any Participant location.

XXXIII. FURTHER ACTION.

The parties shall take all steps necessary, including the execution of documents and/or schedules to carry out the intent of this Agreement and to produce such documents to each other as is required herein.

XXXIV. ENTIRE AGREEMENT.

(a) This document is intended by the parties as the final and binding expression of their agreement and is a complete and exclusive statement of the terms thereof and supersedes all prior negotiations, representations, agreements and no representations, understandings, or agreements have been made or relied upon in the making of this Agreement other than those specifically set forth herein.

(b) No modification or waiver of any terms and conditions of this Agreement shall be effective unless such modification or waiver is expressed in writing and signed by each of the parties. This Agreement may be amended only in writing and signed by each of the parties. No course of prior dealings between the parties and no use of trade shall be relevant or admissible to supplement, explain or vary the terms of this Agreement, whether the same be consistent with the terms of this Agreement or otherwise.

XXXV. SAVINGS CLAUSE.

If any provision of this Agreement shall be deemed or declared unenforceable, invalid or void, the same shall not impair any of the other provisions contained herein which shall continue to be enforceable in accordance with their respective terms, except that this clause shall not deprive any party of any remedy afforded under this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed by their duly authorized officers the day and year first above written.

____
Vendor

By: ________________________________

Date: ______________________________

__________________________ CONSORTIUM:

Central School District

By: ________________________________
President, Board of Education

Date: ______________________________

Central School District

By: ________________________________
President, Board of Education

Date: ______________________________
[Etc. (other school districts)]

M

An Update to "Voluntary Desegregation Under Fire"

September 25, 2000

Maree F. Sneed
John W. Borkowski
Audrey J. Anderson
Hogan & Hartson L.L.P.

Many school districts voluntarily employ a wide range of race-conscious student assignment measures to maintain or increase the diversity of their student bodies and to avoid racial isolation. With increasing frequency, parents have challenged such race-conscious admissions policies, alleging that they violate the rights of students under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs in these suits typically argue that an admissions policy that includes any consideration of race is unconstitutional unless it remedies past proven discrimination. This paper reviews some of the most recent decisions concerning voluntary race-conscious admissions policies in public school districts.

As a whole, the recent cases pertaining to voluntary race-conscious admissions policies demonstrate that this area of law remains in flux. Nonetheless, some general observations may be made: A voluntary race-conscious admissions program that is challenged on Equal Protection grounds likely will be subject to strict scrutiny, which requires that for the program to pass constitutional muster it must be narrowly tailored to support a compelling governmental interest. The number of challenges to race-conscious admissions programs also is growing; both parents of children who are affected by these programs and advocacy groups that seek the elimination of all race-conscious programs seem increasingly willing to bring such lawsuits.

This article reviews the general legal principles that originally were developed by the Supreme Court in other contexts and more recently have been applied by lower courts in cases involving elementary and secondary student assignment issues. A discussion of the various trial and intermediate appellate court decisions follows. While the results and rationales in these cases are often inconsistent, generally more legal challenges are being brought, and the courts are applying heightened judicial scrutiny.

I. Background

In its landmark 1978 decision in Board of Regents of the University of California v. Bakke, 438 U.S. 265, the United States Supreme Court considered for the first time the legality of voluntary race-conscious measures designed not to discriminate, but to serve a beneficial purpose. The plaintiff, Allan Bakke, challenged an affirmative action admissions policy for applicants to medical school at the University of California. The Supreme Court, through Justice Powell who cast the tie-breaking vote, held that colleges and universities may only take race and ethnicity into account to foster diversity in their student bodies through carefully designed admissions programs that consider race as one of many factors contributing to genuine diversity. At the same time, the Court held that rigid racial quotas or set-asides in the context of graduate school admissions policies are illegal.

Subsequently, outside the education arena, the Supreme Court elaborated on affirmative action law, most particularly in two decisions concerning government contracts -- City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The Court ruled in these cases that judges should subject such affirmative action programs to "strict scrutiny." Under this legal standard, a permissible program must be narrowly tailored to meet a compelling governmental interest. While this standard is exacting, Justice O'Connor, in her opinion for the majority in Adarand, sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

Soon thereafter, in a controversial decision, the United States Court of Appeals for the Fifth Circuit applied the Supreme Court's decisions in Croson and Adarand to conclude that Bakke no longer represents current law. In Hopwood v. Texas, 78 F.3d 932 (5th Cir.), rehearing denied, 84 F.3d 720, cert. denied, 518 U.S. 1033 (1996), the Fifth Circuit found unconstitutional a University of Texas Law School admissions process that targeted specific percentages of Mexican-American and African-American students. Remarkably, the court of appeals refused to rely on Justice Powell's Bakke opinion for the proposition that promoting the educational benefits of diversity is a compelling governmental interest, asserting that his opinion did not represent the view of a majority of Supreme Court Justices in Bakke and that subsequent Supreme Court decisions indicate a contrary position. The full Fifth Circuit denied rehearing en banc over the dissent of seven judges. The Supreme Court declined to review the case, neither endorsing nor invalidating its conclusions. As a result, the Hopwood decision has binding authority only in the three states in the Fifth Circuit (Texas, Louisiana and Mississippi), but other courts throughout the nation have had to grapple with its fallout.

II. Recent Cases Concerning Race-Conscious Student Assignment Measures

In the wake of the Fifth Circuit's 1996 decision in Hopwood, similar challenges have been mounted against school districts that take race into account in their student assignment process. These decisions conflict with one another in many important respects, but until the Supreme Court lays to rest the confusion generated by Hopwood and its progeny, parsing their various holdings can provide at least some guidance.

The cases are grouped below according to the type of measure challenged -- magnet and district-wide school, laboratory school, interdistrict transfer, intradistrict transfer, and controlled choice policies -- rather than their outcomes or reasoning. In each discussion, we first present in chronological order the cases, if any, that have resulted in decisions by the courts of appeals. We then present the district court decisions that have not been addressed by the appellate courts.

A. Magnet and District-Wide Schools

In recent years, admissions policies for magnets and district-wide schools have been attacked more frequently than any other type of race-conscious student assignment practice.

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1. Court of Appeals Decisions

In Ho v. San Francisco Unified School District, 147 F.3d 854 (9th Cir. 1998), the Ninth Circuit held that strict scrutiny should apply to race-conscious student assignments made by the school district in order to comply with a desegregation consent decree that originally was approved by a federal district court in 1983 and remained in effect.

The Ho suit was brought in 1994 by a class of Chinese-American students against the San Francisco Unified School District ("SFUSD") alleging that the district's use of race in making student assignments pursuant to a desegregation consent decree violated the Equal Protection Clause. The Ho plaintiffs challenged one portion of a consent decree entered in 1983 to settle a desegregation lawsuit brought by the NAACP. This portion of the consent decree required that all schools have representation from at least four different racial/ethnic groups and that no racial/ethnic group constitute more than 45 percent of the enrollment of any regular school or more than 40 percent of any alternative school.

In May 1997, the district court denied the plaintiffs' motion for summary judgment, and the plaintiffs appealed. In an opinion dismissing the appeal for lack of jurisdiction, the Ninth Circuit held that strict scrutiny was the proper standard to apply and that the proper issues for trial were (1) whether "vestiges remain of the racism that justified" the racial balance portion of the 1983 consent decree; and (2) whether that portion of the consent decree is "necessary to remove the vestiges if they do remain." Ho v. San Francisco Unified School District, 147 F.3d 854, 865 (9th Cir. 1998). In holding that strict scrutiny should apply the court disregarded a number of Supreme Court decisions holding that district courts have broad discretion in developing desegregation remedies.

On remand, before a trial on the merits began, the parties settled the case, and the settlement agreement was approved by the district court. Ho v. San Francisco Unified School District, 59 F. Supp. 2d 1021 (N.D.Cal. 1999).

In Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998), the First Circuit faced the type of elementary and secondary school assignment that is most analogous to the graduate school admission situation addressed by the Supreme Court in Bakke, and by the Fifth Circuit in Hopwood; the Boston school system used a race-conscious admissions policy for an academically selective school, the Boston Latin School. 1/ Under the challenged policy, applicants to Boston Latin, the most

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1/ This situation is analogous to graduate school admissions and unlike most other student assignment issues for two principal reasons. First, a unique opportunity is being provided to some students and not to others, whereas most student assignment decisions, at least in theory, involve the placement of students in roughly comparable schools. Indeed, on this basis, the Ninth Circuit has distinguished between voluntary desegregation efforts and "racial preference programs." In Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir.), cert. denied, 552 U.S. 963 (1997), the court recognized that "'stacked deck,' programs [such as race-based affirmative action] trench on Fourteenth Amendment values in ways that 'reshuffle' programs [such as school desegregation] do not. Unlike racial preference programs, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights." Id. at 708 n.16 (internal quotations and citations omitted). Of course, many other lower courts have not accepted the logic of this dicta.

Second, the Boston Latin situation differs from most student assignment measures because academic selection criteria may create a sense of merit-based prestigious of the city's "examination schools," received a composite score based on grades and standardized test performance. Half the seats in the entering class were assigned strictly according to score, without regard to race; half were allotted in proportion to the racial composition of the pool of qualified applicants, *i.e.*, those scoring above the fiftieth percentile.

Sarah Wessmann, a white student who was rejected -- and whose composite score was higher than that of some African-American and Hispanic students who were admitted -- sued on Equal Protection grounds. A federal district court upheld the plan after a full trial, holding that although "strict scrutiny" applied to the race-conscious policy, the school district's interests in promoting a diverse student body and remedying vestiges of past discrimination were "compelling," and the policy constituted a permissible, "narrowly tailored" means of achieving those goals.

A divided First Circuit panel reversed. Although the court acknowledged the educational benefits of diversity, in scrutinizing the policy's "concrete workings," the court found no adequate link between the policy and the school district's educational goals. The court was unconvinced that Boston Latin needed to employ race-conscious methods, as opposed to "a strict merit-selection approach," to achieve sufficient diversity or to prevent racial isolation.

The court of appeals also held that remedying past discrimination did not justify the policy. Reversing a district court determination that a prior judicial

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entitlement. While many school districts have such policies for some schools, most finding of discrimination in a desegregation case that already had ended with a declaration of unitary status was a sufficient predicate for race-based action, the court held that a "fact-sensitive inquiry" is needed to determine whether a "strong basis in evidence" for such action remained. Rejecting the school district's data showing a "persistent achievement gap" at the primary school level between white and Asian students on the one hand and African-American and Hispanic students on the other, the court concluded that there was no strong basis in evidence for a finding of intentional discrimination.

The Boston School Committee did not seek review by the Supreme Court. The holding in Wessmann applies to states in the First Circuit (Maine, Massachusetts, New Hampshire and Rhode Island, as well as Puerto Rico).

In Tuttle v. Arlington Public Schools, 195 F.3d 698 (4th Cir. 1999), cert. dismissed, 120 S. Ct. 1552 (2000), the Fourth Circuit upheld a district court decision striking down an attempt by the Arlington Public Schools to adopt a voluntary race-conscious admissions policy for a district-wide elementary school known as the Arlington Traditional School ("ATS").

Arlington's first race-conscious admissions policy for ATS randomly assigned lottery numbers to students and then admitted students from the list so that the class would mirror the percentages of each racial group in the district, skipping over white students with better lottery numbers in favor of lower ranked minority students as necessary. In Tito v. Arlington Public Schools, 1997 U.S. Dist.

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student assignment measures are not dependent on academic criteria.

LEXIS 7932, No. 97-540-A (E.D. Va. May 13, 1997), the district court entered a preliminary injunction finding that the plaintiffs had shown a high probability that they could show that this policy violated the constitutional rights of Arlington students, based on the court's view that the school district's policy did not serve a compelling interest and, in any event, was not narrowly tailored.

Rather than appeal the Tito decision, the Arlington School Board attempted to create an admissions policy that would satisfy strict scrutiny. The new admissions policy weighted applications to ATS to the extent that the applicant pool failed to reflect three factors in district-wide demographics -- low-income status, first language and race. If the applicant pool reflected community demographics for these factors, plus or minus 15 percentage points, admissions would be made by random lottery. If the applicant pool varied by more than 15 percentage points from the district-wide averages for the three factors, then applications would be weighted, with low-income status and first language considered before race. Nevertheless, race was sometimes a factor in the admissions process; when the policy was applied to the applicant pool for 1998-99, for example, African-American students had their names entered into the lottery more times than white students of the same income and language status. Admissions were made to the school based strictly on the lottery results.

Parents of white students not selected for ATS challenged the revised policy. The district court, after rejecting defendants' requests at the preliminary injunction hearing to offer testimony and evidence concerning Arlington's compelling educational reasons for promoting diverse school enrollments and the narrow tailoring of its admissions policy to serving those interests, entered a permanent injunction ordering Arlington to select students for ATS by means of a purely random lottery. Tuttle v. Arlington Public Schools, 1998 U.S. Dist. LEXIS 19788, No. 98-418 (E.D. Va. April 14 23, 1998). The district court held that the consideration of race in the weighted lottery violated the Equal Protection Clause because the district's interest in promoting diverse student enrollments was non-remedial. The district court also struck down Arlington's use of first language and family income factors in the admissions policy, finding that first language was used as a proxy for race and that the low-income factor merely made the racial preferences more complicated. The school district appealed.

The Fourth Circuit affirmed the district court's judgment that the revised policy for admissions to ATS violated that Equal Protection Clause. Tuttle v. Arlington County Public Schools, 195 F.3d 698 (4th Cir. 1999), cert. dismissed, 120 S. Ct. 1552 (2000). The court of appeals stated that the issue of whether diversity could be a compelling state interest had not been decided, either by that court or by the Supreme Court. The Fourth Circuit, for purposes of its decision, assumed that diversity was a compelling state interest and went on to examine whether the policy was narrowly tailored. Before beginning its narrow-tailoring analysis, the court of appeals stated that, with regard to the policy's use of race and ethnicity, the policy "was not narrowly tailored because it relies upon racial balancing. Such nonremedial racial balancing is unconstitutional." Id. at 705. The court of appeals then went on to discuss the various grounds on which it found the policy to be insufficiently narrowly tailored. The court of appeals, however, conducted its narrow tailoring analysis in the absence of any factual findings by the district court and indeed in the absence of any evidentiary record whatsoever. On the other hand, the court of appeals held that the district court had erred by requiring the school board to admit students to ATS by a double-blind random lottery and remanded for an evidentiary hearing to allow the school board to present alternative admissions policies.

2. District Court Decisions

In Benkeser v. DeKalb, No. 1:97-CV-02369 (N.D. Ga. August 22, 1997), a district court rejected an equal protection challenge made by white students who were not admitted to Kittredge Elementary, an academically selective magnet school that was instituted by DeKalb County, Georgia as part of its successful plan to attain unitary status. Kittredge employed admissions criteria based on grade point average and standardized test scores. All applications meeting the admissions criteria were separated into an African-American group and a group for students of all other races. Students were then selected randomly from each group so that the entering class would be 50 percent African-American and 50 percent all other races.

The district court denied plaintiffs' request for a temporary restraining order without even discussing the merits of their claims. The court concluded that plaintiffs had suffered no injury because they could have been admitted to another DeKalb elementary magnet program with the same curriculum, class size, admissions standards and racial balance as Kittredge. The district court also found that the prospect of having to admit the 98 other similarly situated white students who were denied admission to Kittredge presented a serious risk of harm to the school district. The court further noted that the plaintiffs had waited to file suit until six days before school started, thereby denying the school district the opportunity to redress their alleged injury through means other than admission to Kittredge.

In Rosenfeld v. Montgomery County Public Schools, 41 F. Supp. 2d 581 (D. Md. 1999), the parents of a white brother and sister alleged that the admissions policy for highly gifted magnet schools operated by Montgomery County Public Schools violates their Equal Protection rights. The boy was an unsuccessful applicant to a highly gifted program for elementary students and claimed better credentials than those of several minority students who were accepted. When the complaint was filed, the girl had not yet applied to the highly gifted program but "fear[ed]" that her anticipated application would be subject to the use of racial preferences by the school district. The school district moved to dismiss all claims on the basis that the plaintiffs lacked standing -- the boy because he was now too old to attend the school for which he had not been accepted and the girl because she had not yet applied to the challenged program.

The district court denied defendants' motion to dismiss holding that, pursuant to Supreme Court precedent, a plaintiff's Equal Protection rights are violated by being forced to compete in an admissions process tainted by unlawful racial preferences. Furthermore, the daughter's plan to apply for the highly gifted program in the spring of 1999, in the court's view, rendered her expected injury neither unspecified nor speculative. The son also had standing to maintain his claims, according to the district court, because he planned to apply to a magnet program for gifted high school students.

Discovery was completed in the spring of 2000 and cross-motions for summary judgment on plaintiffs' claims for injunctive relief -- plaintiffs have abandoned any claims for money damages -- are pending in the district court.

In Capacchione v. Charlotte-Mecklenburg Schools, 57 F. Supp. 2d 228 (W.D.N.C. 1999), which was consolidated with the historic desegregation case of Swann v. Charlotte-Mecklenburg Board of Education, the United States District Court for the Western District of North Carolina held that the race-conscious admissions policy used for magnet schools by the Charlotte-Mecklenburg Schools ("CMS") violated the Equal Protection rights of CMS students.

CMS was still subject to desegregation court orders when a student of white and Hispanic parentage brought suit challenging CMS' failure to admit her to a CMS magnet school. She was later joined by a separate group of white parents. Both groups alleged that CMS had achieved unitary status and that, therefore, any continued use of race by CMS in assigning students to school was unconstitutional. The magnet admissions procedures used by CMS, which included preferences for students living close to the school and those with a sibling attending it, relied upon a lottery to generate two lists; one for African-American students and one for non-African-American students. The procedures aimed to admit students in rough proportion to their representation in CMS' overall student body -- 40% African-American and 60% non-African-American. If the openings for one racial group at a particular magnet school exceeded the number of applicants of that race CMS often would leave seats vacant in that school, even if students from the other racial group remained on a waiting list. CMS defended on the grounds that its use of race in admitting students to magnet programs was done pursuant to the court's continuing supervision in the desegregation case.

After a two-month trial, the district court ruled that CMS had attained unitary status and released it from court supervision. The court further held that the court's desegregation orders, while in place, had provided a compelling governmental interest for considering race in CMS' magnet school admissions. Nevertheless, disregarding the traditionally broad discretion of district courts and school districts in fashioning desegregation remedies, the court found that the CMS' magnet procedures had violated students' Equal Protection rights because the consideration of race in those procedures was not narrowly tailored. The court concluded that a particular ratio of African-American to non-African-American students was not required by the court orders, that the policy was inflexible, and that it placed an unfair burden on students of the "wrong race" who remained on waiting lists. 57 F. Supp. 2d at 289-90. In thus applying strict scrutiny, the court disregarded a number of prior rulings holding that district courts and school districts under desegregation court orders have broad discretion in implementing desegregation mandates.

The court issued an injunction forbidding CMS from "assigning children to schools or allocating educational opportunities and benefits through race-based lotteries, preferences, set-asides, or other means that deny students an equal footing based on race." Id. at 294. The court rejected CMS' argument that, once the school district was no longer under court order, a race-conscious policy could be narrowly tailored to achieve its compelling interests in avoiding resegregation and in promoting the educational benefits of diversity. The court cited Wessmann in support of its conclusion that CMS' pursuit of diversity was merely a rationalization for racial balancing forbidden by the Constitution and cited Hopwood for the broader proposition that there may be "only one compelling state interest that will justify race-based classifications: remedying the effects of past racial discrimination." Id. at 241.

CMS and the original African-American plaintiffs in the Swann case appealed the district court's decision to the Fourth Circuit, which stayed the lower court's order pending appeal. Oral argument was held before a panel of the Fourth Circuit on June 7, 2000.

In Scott v. Pasadena Unified School District, No. CV-99-1328 (C.D. Cal. February 8, 2000), the United States District Court for the Central District of California struck down as a violation of the Equal Protection Clause a voluntary race-conscious admissions policy for district-wide schools in Pasadena, California. For the 1999-2000 school year, Pasadena adopted an admissions policy for three district-wide schools. If there are more applications than spaces available, admissions are conducted through a random lottery, as long as the applicant pool is broadly representative of the student population of Pasadena as a whole when considering race, gender, socioeconomic status, language and special needs. If there are more applications than available spaces and if the applicant pool does not broadly reflect the composition of the school district as to the above factors, the lottery for admission is to be weighted in order to approximate more closely the characteristics of the community as a whole. For the 1999-2000 school year, admissions to the three district-wide schools were made by random lottery because the applicant pools for the over-subscribed schools broadly reflected the community.

Parents of white, Hispanic and mixed-race Pasadena students challenged the admissions policy for the district-wide schools as violating, among other things, the Equal Protection Clause. The district court granted summary judgment for the plaintiffs, and denied the school district's motion for summary judgment. The district court held that any student in the district who "stood ready to apply" to the magnet schools had standing to challenge the policy, regardless of whether they had in fact applied, and regardless of whether they had been accepted into the school of their choice. In addition, the district court rejected the defendants' argument that because a race-neutral lottery had in fact been used for the school year in question, the policy had been applied in a race-neutral manner. In the district court's view, one could not have a race-neutral lottery if the school district is "always keeping an eye on the applicant pool to make sure it is a fair representation of the [district's] racial, ethnic . . . make-up as a whole." Slip Op. at 15.

In granting summary judgment to the plaintiffs, the district court applied strict scrutiny to the admissions policy and struck it down on the basis that the defendants had failed to raise an issue for trial as to whether the policy was narrowly tailored to advance a compelling interest. The district court assumed for the basis of the motion that diversity was a compelling state interest but held that the policy was not narrowly tailored. The district court held that the admission policy consisted of "racial balancing" which could not be furthered in a race-neutral manner, and that the policy was not narrowly tailored because, among other things, it had no logical stopping point, and harmed "innocent third parties."

The school district appealed to the Court of Appeals for the Ninth Circuit. Briefing is to be completed in the case by the end of October, 2000.

In Hampton v. Jefferson County Board of Education, Civ. Act. No. 3:98-CV-262-H (W.D. Ky. June 20, 2000), a federal district court, in the context of dissolving a desegregation decree, enjoined the school district from employing rigid racial balance requirements in selecting students for magnet schools but made clear in non-binding dicta its view that the school board remained free to use race as one among many factors in selecting students for magnet schools and to consider race alone as a determinative factor in making assignments to non-magnet schools. The decision in Hampton arose from the request by the parents of an African-American child to dissolve a desegregation decree in place since 1975 which, among other things, set strict racial guidelines governing the number of students who could be admitted to the district's magnet high school. These guidelines prevented the child, and some other interested African-American students, from being admitted into the magnet school.

The district court found that the school district had satisfied the criteria for achieving unitary status and accordingly dissolved the desegregation decree. The court then turned to an assessment of whether the school district's magnet admissions practices would remain constitutional in the absence of a court-ordered duty to remedy past discrimination. Applying strict scrutiny, the court held that voluntarily implemented race-conscious student assignment measures could only survive if they were narrowly tailored to meet a compelling state interest. The court found that none of the school district's proffered justifications was sufficient to uphold the strict racial balance requirements for its magnet schools that had been implemented pursuant to the court's desegregation orders. The court concluded that under Bakke the allocation of limited opportunities in magnet schools could not be based solely on race. The court suggested, however, that Bakke would allow the consideration of race as one of several factors in order to promote the educational benefits of diversity. Nevertheless, the court struck down Jefferson County's current magnet admissions procedures because they only considered race.

The court also indicated that the voluntary maintenance of desegregated schools "should be considered a compelling state interest." Slip op. at 38. The court drew a distinction between selecting students for schools that offer unique educational opportunities (such as magnet schools) and assigning students to schools that are basically equal. With respect to the latter, the court suggested that in its view the use of race as the single determinative criterion would be permissible. The court emphasized its belief that most student assignment decisions should be left (within constitutional parameters) to the discretion of locally elected school boards. Given this latitude, the Jefferson County School Board recently decided not to appeal the decision.

B. Laboratory Schools

In Hunter v. Regents of the University of California, 190 F.3d 1061 (9th Cir. 1999), pet. for cert. pending, the Ninth Circuit affirmed a district court decision upholding a race-conscious admissions policy for a university-based laboratory school. The Corrine A. Seeds University Elementary School ("UES") is operated by the University of California - Los Angeles for the purpose of conducting educational research. The racial and ethnic backgrounds of applicants are considered in admissions to obtain a student body reflective of California's diversity so that educational studies done at the school will be scientifically credible and widely applicable throughout the State. A child who was of white and Asian parentage sued the school alleging that her equal protection rights were violated by the use of race in UES admissions.

The district court and the Ninth Circuit held that the defendants had a compelling interest in improving the public education system through operating a research-oriented elementary school dedicated to improving urban public schools. The courts also found the use of race in the admissions policy to be narrowly tailored to furthering that goal.

On July 18, 2000, the plaintiffs filed a petition for writ of certiorari in the United States Supreme Court, which remains pending.

C. Interdistrict Transfer Policies

1. Court of Appeals Decisions

In Brewer v. West Irondequoit Central School District, 212 F.3d 738 (2d Cir. 2000), the Second Circuit held that reducing racial isolation and ensuring relatively integrated schools may be compelling state interests for the purposes of strict scrutiny. In Brewer, plaintiffs challenged one of the oldest voluntary desegregation efforts in the nation, an interdistrict transfer program in the Rochester, N.Y. area. Under this plan, minority students in the predominantly minority Rochester school district may transfer to schools in five predominantly white surrounding suburbs, and white suburban students may transfer into Rochester schools. The parents of a white student challenged the constitutionality of the transfer program after their child's transfer from Rochester to a suburban school was denied because she was white.

The plaintiffs successfully sought a preliminary injunction from the district court to block the program's operation. Brewer v. West Irondequoit Central School District, 32 F. Supp. 2d 619 (W.D.N.Y. 1999), vacated, 212 F.3d 738 (2d Cir. 2000). The district court heard no evidence but found that plaintiffs had satisfied the standard for obtaining a preliminary injunction by showing that the program was causing them irreparable harm and that they were likely to succeed on the merits. The court found that the program failed both prongs of strict scrutiny analysis. First, the district court adopted the view espoused by the Fifth Circuit in Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 518 U.S. 1033 (1996), that the only interest compelling enough to satisfy strict scrutiny is the remedying of past discrimination. Second, the court further found that even if promoting the educational benefits of diversity were a compelling interest, the program's use of race was not narrowly tailored to meet that goal.

On appeal, a three-judge panel of the Second Circuit reversed the district court's conclusion that plaintiffs were likely to prevail on the merits and vacated the injunction. First, the panel unanimously rejected the district court holding that only remedying past discrimination may constitute a compelling interest. All three panel members agreed that, because there was no contrary Supreme Court holding, the district court should have relied on binding Second Circuit precedent that "explicitly establish[es] that reducing de facto segregation . . . serves a compelling government interest" and that "the state has a compelling interest in ensuring that schools are relatively integrated." 212 F.3d at 749, 750 (citing Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 598 F.2d 705 (2d Cir. 1979) and Parent Ass'n of Andrew Jackson High Sch. v. Ambach, 738 F.2d 574 (2d Cir. 1984)).

Turning to the "narrowly tailored" portion of the strict scrutiny test, a majority of the panel also found that the district court had focused on the wrong question. The lower court asked "whether the Program is narrowly tailored to achieve the goal of 'true diversity,'" which under the Supreme Court's decision in Bakke would suggest that race can only be considered as one among several factors. According to the Second Circuit in this case, the "appropriate inquiry . . . is whether the Program is narrowly tailored to achieve its primary goal of reducing racial isolation resulting from de facto segregation." Id. at 752. In the majority's view, race-conscious measures may be particularly appropriate where the goal is reducing racial isolation because "there is no more effective means of achieving that goal than to base decisions on race." Id. The Court of Appeals also noted that the plaintiff's situation significantly differed from the medical school applicant in Bakke who was "completely denied his education, unlike the [plaintiff] who was only prevented from attending the school of her choice" and was "offered an equivalent alternative education." Id. at 751, 752. On remand for a trial on the merits, the Second Circuit directed the district court to frame its "narrowly tailored" analysis around the goal of reducing racial isolation, rather than achieving "true diversity."

The Brewer plaintiffs have filed a petition for rehearing which remains pending as of the date of this memorandum.

2. District Court Decisions

In Equal Open Enrollment Association v. Board of Education, 937 F. Supp. 700 (N.D. Ohio 1996), a federal district court struck down a race-conscious interdistrict transfer policy. In 1993, the State of Ohio enacted an open enrollment law which allowed any public school student to transfer to adjacent school districts if those districts had passed resolutions allowing such transfers. The law included an exception allowing a transfer to be rejected by the adjacent district "in order to maintain an appropriate racial balance." 937 F. Supp. at 702. In response to this law, the Akron School Board passed a resolution prohibiting any white student from transferring out of Akron and any non-white student from transferring into Akron. Parents of white students wishing to transfer out of Akron filed suit and obtained a preliminary injunction against Akron's policy prohibiting transfers for white students.

The district court found that the Akron policy was neither backed by a compelling governmental interest nor narrowly tailored. The district court found insufficient evidence to support Akron's claim that if white students were allowed to transfer out of the school district, the ensuing "white flight" would result in a segregated system in which white students were educated in the suburbs and non-white students were educated in Akron. The district court held furthermore that even if the school district had a compelling interest in its policy, it was not narrowly tailored because the "necessity for relief was slight," the means chosen by the school district were "the most drastic available," and its policy was completely inflexible. 937 F.2d at 708.

After the district court's entry of a preliminary injunction, the Akron School Board discontinued its participation in the open enrollment process. See Erica J. Rinas, A Constitutional Analysis of Race-Based Limitations on Open Enrollment in Public Schools, 82 Iowa L. Rev. 1501, 1522 (1997).

D. Intradistrict Transfer Policies

1. Court of Appeals Decisions

In Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), cert. denied, 120 S. Ct. 1420 (2000), the Fourth Circuit followed its decision in Tuttle v. Arlington County Public Schools and struck down a race-conscious transfer policy on the basis of narrow tailoring. In Eisenberg, a white first-grader who was denied an intradistrict transfer to a school with a math and science program preferred by his parents, sought a preliminary injunction that would order his transfer to the preferred program. Montgomery County Public

Schools' transfer policy presumptively denied certain transfer requests that would adversely impact the diversity of a school's enrollment and would lead to racial isolation of schools, but it allows hardship exceptions. The plaintiffs sought to transfer from a school where the white enrollment was substantially below that of the school district as a whole and had been dropping for three years.

The district court denied the preliminary injunction request, finding that the balance of harms weighed in favor of the school district, because if plaintiff's transfer request were granted, the requests of many other students would have to be granted, which could lead to racial isolation in the district's schools. 19 F. Supp. 2d at 452. In addition, the district court concluded that the plaintiffs' likelihood of success on the merits was not very strong because the district could have a compelling state interest both in diversity and in limiting transfers that could themselves lead to Fourteenth Amendment violations by creating racially isolated schools. Id. at 454.

The court of appeals reversed the district court's preliminary injunction and went on to order that a permanent injunction be issued forbidding MCPS from considering race in deciding transfer requests. Eisenberg v. Montgomery County Public Schools, 197 F.3d 123 (4th Cir. 1999), cert. denied, 120 S. Ct. 1420 (2000). The Fourth Circuit held that MCPS' interest in diversity and its interest in avoiding racial isolation were one and the same. The Fourth Circuit assumed for purposes of the decision that diversity could be a compelling state interest, passing up the "temptation" to decide the issue, even though it found the arguments "persuasive" and the facts of this case "tantalizing." Id. at 131 n.20.

Because there had been no factual findings by the district court concerning narrow tailoring, the court of appeals made its own factual findings to conclude that the policy -- which the court described as "evil" -- was not narrowly tailored. Id. at 132. As "summarize[d]" by the court of appeals, "Montgomery County's transfer policy . . . is engaging in racial balancing, which we have just held to be unconstitutional in Tuttle." Id. at 133. On top of that, the court of appeals noted, is "the fact that Jacob's transfer request was refused because of his race. As we have pointed out, such race based governmental actions are presumed to be invalid and are subject to strict scrutiny. Nothing in this record overcomes that presumption." Id.

2. District Court Decisions

In Comfort v. Lynn School Committee, 100 F. Supp. 2d 57 (D. Mass. 2000), the United States District Court for the District of Massachusetts denied the request of white plaintiffs to enter a preliminary injunction against the Lynn school district and the State of Massachusetts, challenging Lynn's intradistrict transfer policy, which operates pursuant to the Massachusetts Racial Imbalance Act, Mass. G.L. ch. 71, § § 37C, 37D and c. 15, § § 1I-K. Student assignments in Lynn are generally made by attendance area, but pursuant to the State law, students may apply to transfer to a different school within the district and that transfer will be granted unless the school is racially imbalanced (defined as having a student enrollment that is more than 15 percent different from the district-wide average for elementary schools or more than 10 percent different for high schools) and the transfer would exacerbate the imbalance. For enacting a transfer policy pursuant to the Racial Imbalance Act, the Lynn schools receive additional funding from the state.

The district court found that the plaintiffs had failed to establish irreparable harm because each of the plaintiffs was attending the school of his or her choice and none planned to apply for a transfer. Id. at 63-64. In addition, the district court held that the plaintiffs had failed to establish a sufficient likelihood of success on the merits. The district court rejected the plaintiffs' argument that avoiding racial isolation and promoting diversity could never be compelling state interests, relying on the First Circuit's decision in Wessman to hold that the application of strict scrutiny to the transfer policy is a factually intensive question that could not be answered on the record that existed on a preliminary injunction. The district court held that the Lynn Plan, like the Boston Latin policy at issue in Wessman, must be assessed based on "the actual operation of the plan, the context in which it is administered, and the purposes it serves," thus requiring further development of the record in discovery and a full review on the merits. Id. at 60. The district court noted that the Lynn Plan did not force any student to transfer, it excluded no one from a public benefit, because every student was able to attend a school, and that the policy was flexible because race was "not necessarily determinative" of the outcome of any transfer request. Id. at 67.

E. Controlled Choice Student Assignment Policies

In Boston's Children First v. City of Boston, 62 F. Supp. 2d 247 (D. Mass. 1999), the United States District Court for the District of Massachusetts denied a request to issue a preliminary injunction against Boston's race-conscious controlled choice student assignment plan. The controlled choice plan divided the city into three geographic regions each of which were designed to reflect the school district's system-wide racial composition. Students were allowed to apply for assignment to any school within their residential zone. In assigning students to schools, the Boston School Committee considered, among other factors, whether the racial composition of the school was within plus or minus 15 percentage points of the district-wide average for that student's racial group.

A non-profit organization, Boston's Children First -- after unsuccessfully attempting by petition to get the Boston School Committee to adopt a "neighborhood schools" assignment plan -- brought suit along with the parents of four white school-age children, challenging controlled choice under the Equal Protection Clause. On July 13, 1999, the plaintiffs filed a motion for preliminary injunction seeking to enjoin the Boston School Committee from using controlled choice to assign students for the 1999-2000 school year. On that same day, the Boston School Committee voted to discontinue the consideration of race in its controlled choice plan beginning with the 2000-01 school year.

The district court denied plaintiffs' motion for a preliminary injunction, finding that pursuant to the doctrine of laches, the plaintiffs had unreasonably delayed bringing the lawsuit. The district court also found that the timing of the preliminary injunction motion risked throwing the start of the 1999-2000 school year into chaos and prejudiced the school district, which had inadequate time to react to plaintiffs' complaint.

In considering the likelihood of success on the merits, the court found that it could not conclude that either side was likely to succeed. The court acknowledged the First Circuit's decision in Wessman, but found that the relief sought by plaintiffs -- no consideration of race whatsoever in any admissions decision -- was considerably broader than the court's ruling in Wessman. The district court also concluded that, in order to apply strict scrutiny, it would need a more developed factual record concerning how the controlled choice policy actually operated. The court further found that the balance of harms weighed in favor of the school district, which would have been faced with having to reassign thousands of students and possibly delay the school year.

On May 19, 2000, the district court denied the school district's motion to dismiss on the grounds of standing and mootness. Boston Children's First v. City of Boston, 98 F. Supp. 2d 111 (D. Mass. 2000). The plaintiffs' claims for compensatory damages and permanent injunctive relief are proceeding in the district court.

CONCLUSION

These various decisions underscore the uncertainty surrounding the use of voluntary desegregation measures today. However, a few patterns have emerged.

First, most courts are likely to apply strict scrutiny in assessing race-conscious student assignment measures, and certainly those that involve merit-based selection for what are deemed to be unique educational opportunities, such as the Boston Latin School. Therefore, a school district should be prepared to establish that voluntary race-conscious policies and practices satisfy strict scrutiny; it must be prepared to show that the school district has a compelling interest justifying its use of race as a factor in its decisionmaking and that its program is narrowly tailored to advance that specific interest.

Second, school districts should be aware that a court may reject the argument that promoting the educational benefits of diversity is a compelling interest and hold that any voluntary race-conscious student assignment measure is unconstitutional. On the other hand, some courts continue to find that promoting the educational benefits of diversity, avoiding racial isolation, and other non-remedial interests are sufficiently compelling to survive strict scrutiny.

Third, the narrow-tailoring prong of the strict scrutiny test has been the most difficult for school districts to satisfy. Therefore, it is important that any race-conscious student assignment measure be carefully designed to meet its particular educational purpose in the least burdensome way possible.

Ultimately, the federal courts of appeals and the Supreme Court will have to resolve the questions of whether and in what circumstances race can be considered voluntarily by school systems, for the lower courts now are plainly divided on this issue. In the meantime, school districts should take a cautious approach in voluntarily continuing or implementing any student assignment practices that may be considered to be race-conscious.

Nos. 00-55532, 00-55666, and 00-55789

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA SCOTT, et al.,
Plaintiffs/Appellees/Cross-Appellants,

v.

PASADENA UNIFIED SCHOOL DISTRICT; et al.,
Defendants/Appellants/Cross-Appellees.

Appeal from the United States District Court
for the Central District of California
Case No. CV 99-1328 DT

OPENING/ANSWERING BRIEF FOR PLAINTIFFS, SYLVIA SCOTT, AS GUARDIAN AD LITEM FOR MINORS, DETRICK STANDMORE, KAYLA HUNTER, MICHAELA REYES, AND RONALD RUCKER; RENÉ AMY, AS GUARDIAN AD LITEM FOR MINORS, CAMDEM RENÉ AMY AND MARISSA LARAINE AMY; GEORGE FRANCIS AND SILVIA JIMENEZ MacPHERSON, AS GUARDIAN AD LITEM FOR MINOR, GEORGE GORDON MacPHERSON; ROMEO ALVA, AS GUARDIAN AD LITEM FOR MINOR, JOCELYNE ALVA,

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Dated: August 31, 2000

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Pasadena Bd. of Educ. v. Spangler (1976) 427 US 424 56

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2 Civil Actions Against State and Local Government (2d ed. West Group 1992) § 10.23 50

2 Nahmod, Civil Rights & Civil Liberties Litigation – The Law of Section 1983 (The West Group 1997) § 8.32 49

6 Richardson, Messages and Papers of the President (1897) 405 64

California Practice Guide: Federal Civil Procedure Before Trial (TRG 2000) § 2.1262 26-27

Cong. Globe, 39th Cong., First Sess. (Senate) 1761 64

William W. Howells, The Meaning of Race in the Biological and Social Meaning of Race 16 (Richard H. Osborne ed. 1971) 20

Wright & Miller, Federal Practice & Procedure: Civil 2d § 1278 45

Wright, Miller & Cooper, Federal Practice & Procedure, Jurisdiction 2d § 3531.4 29

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OPENING BRIEF FOR PLAINTIFFS

STATEMENT OF JURISDICTION

This Court has jurisdiction over Plaintiffs/Appellees/Cross-Appellants' appeal pursuant to 28 USC § 1292, governing appeals from final judgment of the district courts. The Court granted judgment on February 23, 2000, awarding, inter alia, damages to Plaintiffs, E.R. 153; Defendants moved to alter/amend the judgment regarding such damages; the Court granted said motion and issued judgment based thereupon on March 30, 2000, E.R. 182. Plaintiffs timely filed a notice of this cross-appeal on April 26, 2000, E.R. 202.

ISSUE PRESENTED

May Plaintiffs maintain a cause of action against individual Defendants under California Civil Code § 51 (the Unruh Act)?

STATEMENT OF THE CASE

Plaintiffs/Appellees/Cross-Appellants ("Plaintiffs"), who are parents or guardians of students in the Pasadena Unified School District, filed this action against Defendant/Appellant/Cross-Appellee Pasadena Unified School District ("District"), members of the Board of Education of the District ("Board"), Joseph White, and the

Superintendent of the District (collectively, "PUSD"). Plaintiffs, who are of various races and ethnicities, claimed that PUSD's procedure for assigning students to three of its schools for the 1999-2000 school year discriminated against them on the basis of race in violation of the 14th Amendment to the United States Constitution; Article I, § 31 of the California Constitution; and the Unruh Act (California Civil Code § 51).

Defendants filed 12b and Summary Judgment Motions, both based on standing. The Court denied both. Plaintiffs filed a Summary Judgment Motion which the Court granted "as to all . . . causes of action." E.R. 150.

On March 20, 2000, the Court dismissed with prejudice Plaintiffs' claim based on California Civil Code § 51, pursuant to Federal Rules of Civil Procedure 60(a) and 12(b)(6). E.R. 162. On March 30, 2000, the Court issued an order granting Defendants' motion to amend the judgment to reflect dismissal of Plaintiffs' Unruh Act claim. E.R. 181. It is from this order and judgment that Plaintiffs appeal.

FACTUAL AND PROCEDURAL BACKGROUND

A. Statement of Facts

PUSD operates three voluntary schools: (1) Don Benito Fundamental School ("Don Benito") includes students in grades K-5; (2) Norma Coombs Alternative

School ("Norma Coombs") includes grades K-8; and (3) Marshall Fundamental School ("Marshall") includes grades 6-12. E.R. 84. While every student in the District is assigned to a neighborhood school, students in eligible grades also may elect to apply to one or more of the voluntary schools. Admission to these schools is voluntary in the sense that it is based on application, rather than student residence within geographical boundaries.

In March 1998, the Board enacted an Integration Policy and Quality Schooling Plan, which amended Board Policy 0460 ("BP 0460"). E.R. 340. Among other provisions, BP 0460 provides:

> At sites where the number of students of any major ethnic group varies from the percentage of such students in the overall District student population by +/-20%, no additional permits or transfers from this group may be granted into these sites.

In other words, each school within the district had to conform to a racial quota template imposed by the district. E.R. 73. The amendment provided for a lottery system to implement the quota; but in each and every case (lottery or not) the ethnic and racial make-up of each school had to fall into certain ranges of percentages. If it did not, it was subject to racial "adjustment." To enforce this quota system, the school applications required applicants to identify their race and ethnicity. E.R. 217.

In the Spring of 1999, PUSD completed the process of assigning students to the voluntary schools for the upcoming 1999-2000 school year. Two of the voluntary schools - Don Benito and Norma Coombs - received more applications than they had seats available. Therefore, on April 7, 1999, PUSD conducted random lotteries for those two schools for admission for 1999-2000. E.R. 85-86. However, lottery or not, each school was required at all times, under BP 0460, to have certain percentages (within ranges) of each race and ethnicity admitted as students.

Three of the eight student Plaintiffs (JOCELYNE ALVA, DETRICK STANDMORE, and RONALD RUCKER) did not apply to any voluntary school for 1999-2000. E.R. 85, 87. Two other Plaintiffs (CAMDEN RENE' AMY and MARISSA LARAINE AMY) applied to Norma Coombs. Two other Plaintiffs (KAYLA HUNTER and MICHAELA REYES) applied and were admitted for 1999-2000 to Marshall, where no lottery was held. E.R. 87; E.R. 85-86. The remaining Plaintiff (GEORGE MacPHERSON) applied to Don Benito and was included in the random, race-neutral lottery for Don Benito that was held on April 7, 1999. His name was not selected in the lottery, and he was placed on the waiting list for Don Benito but was ultimately not admitted. E.R. 85-86.

B. Proceedings in the District Court

On January 28, 1999, Plaintiffs initiated this action in the District Court. E.R. 1. Plaintiffs subsequently filed an Amended Complaint ("Complaint"). E.R. 10. Defendant JOSEPH WHITE was dismissed sometime later.

PUSD filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending that the Plaintiffs lacked standing because they had suffered no injury-in-fact. The District Court denied PUSD's motion.

Defendants filed a Summary Judgment motion. E.R. 48. But it failed as well. The District Court, in denying Defendants' motion, noted that

> [t]he language of BP 0460(d), ¶ 8, render[ed] untenable Defendants' position that places were assigned in a race-, ethnic-, or gender-neutral manner. E.R. 138.

The language of the policy

> le[d] th[e] [c] ourt to conclude that Plaintiffs may not compete on equal ground with other students

and that

> PUSD uses racial and gender classifications to effect [sic] the chances of some students being selected in the lottery. E.R. 138.

On that basis, the Court held that each of the Plaintiffs had suffered an "injury in fact" and thus had standing, and denied PUSD's Motion for Summary Judgment. *Id.*

Plaintiffs' Motion and Plaintiffs' Memorandum in Support of Motion for Summary Judgment ("Plaintiffs Memorandum"), based their claim for summary judgment on, inter alia, the two-part argument that PUSD assigns students to schools on the basis of race and any use of race in determining student placement is subject to strict scrutiny. E.R. 66-68.

Plaintiffs' Motion requested "declaratory judgment" (which was specifically prayed for in counts 2, 3, 4, 5, 6, 7, 9, 10, and 12) and sought judgment on the claims:

> that Defendants' policy in question violates the U.S. Constitution, Am. 14; and the California Constitution Section 1, Article 31 [sic]. E.R. 64.

The Court held that the policy failed the strict scrutiny test. E.R. 147. Further, the Court granted judgment to Plaintiffs "as to all . . . causes of action." E.R. 150. The Court's broad injunction "permanently enjoined" PUSD from "considering race, ethnicity, or gender in determining admission to any of its schools." E.R. 154. Finally, the Court granted judgment and damages under the Unruh Act, in the amount of One Thousand Dollars ($1,000.00) per Plaintiff. However, the Court, under Federal Rules of Civil Procedure 60, amended Plaintiffs' judgment, denying recovery under the Unruh Act, noting,

> given that the statute only applies to businesses, Plaintiffs could only conceivably pursue this course of action, if at all, against Defendant WHITE, not to individual Defendants. E.R. 172.

SUMMARY OF ARGUMENT

An Unruh Act cause of action (Civil Code § 51), may be filed against individuals as well as businesses. The racial quota mandated by BP 0460 is a direct violation of the Unruh Act. The Court should thus have found liability under the Unruh Act against the individual defendants.

STANDARD OF REVIEW

Dismissals without leave to amend pursuant to Federal Rules of Civil Procedure 12(b) are reviewed *de novo*. Such a dismissal is appropriate only if it appears "beyond a doubt" that the complaint cannot be saved by further amendment. Steckman v. Hart Brewing Inc. (9th Cir. 1998) 143 F.3d 1293, 1295; Schneider v. California Dept. of Corrections, (9th Cir. 1998) 151 F.3d 1194, 1196; Dumas v. Kipp (9th Cir. 1996) 90 F.3d 386, 389. As the Court dismissed the 11th count under Federal Rules of Civil Procedure 12(b)(6); E.R. 167, 179; the standard of review is *de novo*.

ARGUMENT

School officials are subject to the Unruh Act.

The sole point on which the Court amended its initial judgment was that the individual board member Defendants could not be liable under the Unruh Act because that Act only prohibits actions by "businesses." E.R. 172. It is thus that point, and that point alone, that Plaintiffs address.

In Nicole M. v. Martinez Unified School District (N.D. Cal. 1997) 964 F.Supp. 1369, a female student sued a school district, superintendent and principal under 42 USC § 1983 and California Civil Code § 51 for discrimination. Upon Defendants' motion to dismiss, the Court squarely faced the question involved here and found Plaintiff could sue individual defendants under the Unruh Act.

First, the Court found that the legislature intended the term "business establishments" in Civil Code § 51 be read "in the broadest sense reasonably possible", quoting Isbister v. Boys Club of Santa Cruz, Inc. (1985) 40 Cal.3d 73. Nicole M., *supra,* at 1388.

Next, the Court found that other California district courts had also found school districts to be "business establishments" within the meaning of the Unruh Act. *Id.*

Lastly, the Court found that, because Civil Code § 52(a) allows Plaintiffs to recover damages against whoever "makes any discrimination or distinction contrary to § 51 or 51.5," Plaintiff could bring a claim against the principal and superintendents for violation of the Act. *Id.*; see, also, Davison ex rel Sims v. Santa Barbara High School District (C.D. Cal. 1998) 48 F.Supp.2d 1225 [Student allowed to sue superintendent, principal, vice principal, and teacher for racial discrimination under the Unruh Act]; and Aikens v. Helena Hosp. (N.D. Cal. 1994) 843 F.Supp. 1329, 1339.

The application here is clear. PUSD was a business establishment within the meaning of the Act. Further, the individual Defendants are liable thereunder as they, through their policy, discriminated against Plaintiffs contrary to Civil Code § 51. Such discrimination has already been found by the Court.

The decision of the lower court on this sole point should be reversed, and judgment entered reinstating the damage award for Plaintiffs.

CONCLUSION

The sole reason the District Court dismissed the Unruh Act cause of action was because Defendants were individuals. However, district courts within the 9th Circuit have held that individuals can be liable for damages under the Unruh Act. Such a case is the present one. The lower court should be reversed on this point, and judgment entered for Plaintiffs for an award of damages pursuant to Civil Code § 52.1.

ANSWERING BRIEF OF PLAINTIFFS

JURISDICTIONAL STATEMENT

1. The District Court had jurisdiction over this action.

2. This Court has jurisdiction over this appeal pursuant to 28 USC § 1292 governing appeals from final judgments of the district courts. The District Court's order denying Defendants' Motion for Summary Judgment and granting Plaintiffs' Motion for Summary Judgment was entered on February 8, 2000. E.R. 124. Judgment was entered on February 23, 2000. E.R. 153. Defendants/Appellants filed a Notice of Appeal on March 20, 2000. The District Court entered an Amended Judgment on March 31, 2000, and Defendants/Appellants filed a Second Notice of Appeal on April 11, 2000. Plaintiffs filed a Notice of Cross-Appeal on April 26,

2000. E.R. 442. The appeals were consolidated on May 5, 2000. E.R. 186.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in denying Defendants' Motion for Summary Judgment on grounds that Plaintiffs had standing to challenge PUSD's "voluntary schools" admissions policy.

2. Whether the District Court erred by granting Plaintiffs' Motion for Summary Judgment as to all causes of action.

3. Whether the District Court erred in permanently enjoining PUSD from considering race, ethnicity, or gender in student assignments to schools.

4. Whether the District Court erred in granting Plaintiffs' Motion for Summary Judgment as to State law claims.

STATEMENT OF THE FACTS [1]

This action arose out of a policy enacted by the PASADENA UNIFIED SCHOOL DISTRICT which established procedures for determining which children

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[1] This statement is taken verbatim (with tense and other non-substantive changes) from the District Court's Order of February 7, 2000. E.R. 125 ff. Plaintiffs wish to inform this Court objectively with the facts, untainted by argument or bias.

BEST COPY AVAILABLE

may attend certain schools within the school district on the basis of the children's race, color, national origin, ethnicity, or gender. This policy was named Board Policy 0460 ("BP 0460"). E.R. 340.

The case was brought by Plaintiff, Sylvia Scott, as guardian ad litem for minors, Detrick Standmore, Kayla Hunter, Michaela Reyes, and Ronald Rucker; Plaintiff René Amy, as guardian ad litem for minors, Camden René Amy and Marissa Laraine Amy; Plaintiffs George Francis MacPherson and Silvia Jimenez MacPherson, as guardians ad litem for minor, George Gordon MacPherson; Plaintiff Romeo Alva, as guardian ad litem for minor, Jocelyne Alva (collectively, "Plaintiffs") against Defendants Pasadena Unified School District ("PUSD"), George Van Alstine, George Padilla, Jacqueline Jacobs, Bonnie Armstrong, Lisa Fowler, and Vera Vignes (collectively, the "Individual Defendants"), and Joseph White Associates ("White"). Plaintiffs' minors are students who attend schools within PUSD.

PUSD operates three voluntary schools: Don Benito Fundamental School; Norma Coombs Alternative School; and Marshall Fundamental School (collectively, the "Voluntary Schools").

Beginning with applications in the Spring of 1999 for the 1999-2000 school year, PUSD established a new procedure for admitting the entering class to Voluntary Schools. If there are more applications than available places, first consideration is given to siblings of students already enrolled in the school. If places are still available after siblings have been admitted, any remaining students are selected using a computerized lottery.

Other than the three voluntary schools, no school in PUSD uses a lottery to admit students.

If a lottery is conducted, PUSD may, in certain circumstances, give consideration to one or more of several factors, including race, ethnicity and gender but only if necessary to create an integrated setting, because students with such characteristics were significantly under-represented in the application pool.

On April 7, 1999, PUSD conducted lotteries for two of the Voluntary Schools – Don Benito and Norma Coombs. The third voluntary school, Marshall Fundamental, had seats available for, and admitted, all applicants.

Two of the Plaintiffs, Kayla Hunter and Michaela Reyes, applied and were admitted to Marshall Fundamental for the 1999-2000 school year.

Three of the eight student Plaintiffs, Jocelyne Alva, Detrick Standmore, and

Ronald Rucker, did not apply to any of the PUSD voluntary schools for the 1999-2000 school year.

Two of the Plaintiff students, Camden René Amy and Marissa Laraine Amy, applied to Norma Coombs.

Plaintiff George MacPherson applied to Don Benito for 1999-2000, was included in the random lottery for Don Benito that was held on April 7, 1999, and was not selected.

PROCEDURAL SUMMARY

On February 4, 1999, Plaintiffs filed a Complaint (E.R. 1) in District Court for Declaratory Relief and Injunctive Relief from Policies and Practices of Defendants.

On February 4, 1999, George Francis MacPherson and Silvia Jimenez MacPherson filed a petition and order for Appointment of Guardian Ad Litem as the parents of George Gordon MacPherson, minor. On February 4, 1999, René Amy filed a petition and order for Appointment of Guardian Ad Litem as the parent of Camden René Amy and Marissa Laraine Amy, minors. On February 4, 1999, Romeo Alva filed a petition and order for Appointment of Guardian Ad Litem as the foster parent of Detrick Standmore, Kayla Hunter, Michaela Reyes, and Ronald Rucker, minors.

On March 29, 1999, Plaintiffs filed a First Amended Complaint (E.R. 10) alleging the following counts:

(1) Count 1 (as to all Defendants – general allegations of conduct).

(2) Count 2 (as to all Defendants – violation of 42 USC § 1985).

(3) Count 3 (as to Individual Defendants – deprivation of the privileges to a public education secured by the U.S. and California Constitutions.

(4) Count 4 (as to Individual Defendants – deprivation of the equal protection of the laws pursuant to the 14th Amendment of the U.S. Constitution and Article I, § 7, of the California Constitution).

(5) Count 5 (as to Individual Defendants – violation of Article I, § 31, of the California Constitution).

(6) Count 6 (as to Individual Defendants – violation of the equal protection provisions of the 5th and 14th Amendments to the United States Constitution, and Article I, § 7, of the California Constitution).

(7) Court 7 (as to Individual Defendants – violation of the privileges and immunities clauses of the 14th Amendment to the United States Constitution, and

Article I, § 7, of the California Constitution).

(8) Count 8 (as to Individual Defendants – violation of the California Code of Civil Procedure § 526a).

(9) Count 9 (as to Individual Defendants – violation of Article I, § 8, of the California Constitution).

(10) Count 10 (as to Individual Defendants – violation of 42 USC § 1983).

(11) Count 11 (as to Individual Defendants and White – violation of California Civil Code § 51).

(12) Count 12 (as to PUSD and Individual Defendants – violation of 42 USC § 2000d).

On April 19, 1999, Defendants filed a Motion to Dismiss Complaint. On April 23, 1999, Defendants filed a Corrected Motion to Dismiss Complaint. E.R. 24.

On June 17, 1999, Plaintiffs filed a Notice of Voluntary Dismissal of Defendant White, without prejudice.

On June 28, 1999, the District Court filed an Order Denying Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint. E.R. 29.

On July 8, 1999, Defendants filed an Answer to Plaintiffs' First Amended

Complaint.

On September 7, 1999, the District Court held a Mandatory Status Conference, where it set the Discovery Cut-Off date of February 18, 2000, and the Pre-Trial Conference for April 17, 2000.

On December 7, 1999, Defendants filed their Motion for Summary Judgment.

On January 10, 2000, the District Court issued an Order Granting Defendants' Ex-Parte Application to Continue the Hearing for Defendants' Motion for Summary Judgment. The District Court continued the hearing date on Defendants' Motion for Summary Judgment from January 18, 2000, to February 7, 2000.

On January 14, 2000, Plaintiffs filed a Motion for Summary Judgment.

On February 7, 2000, the District Court issued an Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiffs' Motion for Summary Judgment. E.R. 124. This Order was entered on February 8, 2000.

On February 18, 2000, Plaintiffs filed their Motion for Attorney's Fees, Damages, and Costs. E.R. 416.

On February 22, 2000, the District Court issued a Judgment, Findings of Fact and Conclusions of Law. E.R. 434. The Judgment, Findings of Fact and Conclusions of Law were entered on February 23, 2000.

On March 20, 2000, the District Court issued a sua sponte order, denying Plaintiffs' Motion for Damages and Costs, and granting Plaintiffs' Motion for Attorneys' Fees. E.R. 162.

On March 29, 2000, the District Court issued an amended Judgment. E.R. 181.

On April 11, 2000, Defendants filed a Notice of Appeal. E.R. 181.

On April 26, 2000, Plaintiffs filed their Notice of Cross-Appeal. E.R. 442.

On May 5, 2000, the Court of Appeal consolidated the appeals. E.R. 186.

SUMMARY OF ARGUMENT

The district court correctly found that Plaintiffs (referred to collectively as "Scott" or "Plaintiffs" herein) had standing under Article III of the U.S. Constitution as articulated in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville (1993) 508 US 656. The injury initially occurred during the application process when Scott was prohibited by BP 0460 from applying to 100% of the available seats. Said injury happened prior to when the lottery was conducted. Subsequent to the filing of the First Amended Complaint, PUSD attempted to moot the case by its supposed voluntary cessation of the illegal conduct.

PUSD is in error by using its supposed voluntary cessation as a means of challenging Scott's standing.

PUSD's use of race in limiting young children from applying to all available seats is unconstitutional in that PUSD has failed to demonstrate a narrowly tailored compelling state interest. Scott raised this issue in its motion for summary judgment. However, PUSD chose to ignore this issue, though it had the burden of proof thereon. Moreover, the district court had ample evidence, in light of the undisputed facts, to rule for Scott. PUSD is in error by using its own failure to defend as a means of seeking to reverse the lower court's decision.

Finally, PUSD claims that all Defendants enjoy 11th Amendment immunity as to State causes of action. But PUSD errs. First, Defendants have waived that defense. Second, each and every State cause of action derives from Federal laws. Indeed, several of the State statutes and sections of the California Constitution incorporate the Equal Protection Clause of the 14th Amendment. As such, federal issues are sufficiently present to prevent 11th Amendment immunity. And, third, the individual Defendants, sued as individuals, cannot claim 11th Amendment immunity.

ARGUMENT

I.

INTRODUCTION

The present case involves a public school districts' use of racial classifications to determine how many students of various races can attend a given school. This Court has recently stated why this is problematic declaring that "the use of race by government is, in general, highly disfavored by the law." Ho v. San Francisco Unified School District (9th Cir. 1998) 147 F.3d 854, 862.

This Court articulated several reasons for this disfavor:

> First. Race has regularly been used as a way of oppressing, persecuting, or discriminating against a group of persons on the basis of alleged color or some other accidental physical attribute ... *Id.*

Next, this Court found that race is an artificial concept gaining its "standing in the nineteenth century by pseudo-science." *Id.* This Court went on to note that:

> [n]ow it is scientifically accepted that races "are not, and never were, groups clearly defined biologically." See, William W. Howells, The Meaning of Race in The Biological and Social Meaning of Race 16 (Richard H. Osborne ed. 1971). *Id.* at 863.

Finally, this Court recognized that a fundamental problem with the concept of race is that it places people in groups. When state actors do this, they stray from core constitutional premises:

> The legal rights of Americans are personal. Our rights belong to each of us as individual persons. Our rights are not conferred upon us as members of any group or as a corollary of any racial identification. *Id.* at 864; see, also, Shaw v. Reno (1993) 509 US 630, 643.

Contrary to this, PUSD seeks to continue a policy which classifies children according to race and prevents them from applying for all available seats at public schools based upon their impact on the racial make-up of a given campus. Scott contends that, absent a narrowly tailored compelling state interest, this is unconstitutional.

II.

PLAINTIFFS HAVE STANDING.

Defendants' chief point alleges lack of standing;[2] and the element alleged to be lacking is "injury in fact."

However, Plaintiffs have proved "injury in fact" beyond dispute.

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[2] Defendants argue and distinguish between which Plaintiffs did or did not apply to the schools. However, it is undisputed that George MacPherson had standing as he applied and was rejected; and if any Plaintiff has standing, it satisfies the standing requirement for all co-Plaintiffs. Director, Office of Workers' Compensation Programs v. Perini North River Associates (1983) 459 US 297, 303-305; Arlington Hts. v. Metropolitan Housing Dev. Corp. (1977) 429 US 252, 264 (n.9); Department of Commerce v. United States House of Representatives (1999) 525 US 316; 119 S.Ct. 765, 773.

First, the injury in fact pertaining to equal protection cases (such as the current case) has been clearly defined in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville (1993) 508 US 656. The Court noted:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The *"injury in fact" in an equal-protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit ...*
>
> And in the context of a challenge to a set-aside program, the "injury in fact" is the ability to compete on an equal footing in the bidding process, not the loss of a contract.
>
> *Id.* at 666 [Emphasis added; internal brackets omitted.]

and:

> Whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. Adarand Constructors, Inc. v. Pena (1995) 515 US 200, 230.

And in Regents of the University of California v. Bakke (1978) 438 US 265, a white male applicant claimed that a medical school admissions program, which reserved 16 of the 100 places in the entering class for minority applicants, violated the equal protection clause. The Court found standing and concluded that the Constitutional requirements of Article III were satisfied in that the requisite injury was the *school's decision* not to permit Bakke to compete for all 100 places in the class simply because of his race. *Id.* at 320. The Court went on to state that,

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. *Id.* at Fn.14.

Precisely as in Bakke, Defendants' policy forbids Plaintiffs from applying for admission to all of the seats available at the designated schools in question. As BP 0460 states,

> At sites where the number of students in any major *ethnic group* varies from the percentage of such students in the overall district student population by +/-20%, no additional permits or transfers [3] from this group may be granted into these sites. *Id.* at (c). E.R. 341. (Italics added.)

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[3] Despite Defendants' assertion that the policy only applies to students entering the initial grades in these particular schools, the policy itself speaks to *all transfers* as well as permits and does not limit itself to any particular grades. E.R. 342. Moreover, if a child in an "entering grade" must repeat the grade, s/he would be subject once again to the policy if there is another attempt at entering a voluntary school.

Second, it is beyond dispute that Defendants used race as a criterion in school admissions for some time.[4] Applicants must identify their race on the application. E.R. 217, 389. And Defendants, in other contexts, affirmed they did indeed use race for admissions. For example, Vera Vignes made representations to the Legislature and Legislative Counsel that PUSD uses upper and lower limits "on the percentages of students in the three major racial groups" for assigning seats in the three voluntary schools. E.R. 333. In addition, her representation was made in an attempt to obtain "voluntary desegregation funds" for the 1999/2000 school year. By law, this funding is to be used for racial purposes. Education Code § 42249(a). In other words, Defendants admit race plays a part in their program. But even more, Defendants' own policy required each school to conform to Defendants' racial quota/percentages – at *all times* and whether or not a lottery was held.[5] By measuring Plaintiffs' effect on the racial balance, Defendants subjected Plaintiffs to discrimination – whether or not they were denied admission.

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[4] BP 0460 has been a policy at PUSD for many years. Save for the lottery, the racial and ethnic content of the policy is essentially the same in the 1998/1999 school year as the previous years. E.R. 333.

[5] PUSD claims that it offered direct evidence of its conduct via the declarations of Vera Vignes. The first two declarations were not made with personal knowledge and contradict each other. The district court noted this in a footnote in its order denying PUSD's 12(b) motion. E.R. 44-45. Moreover, Scott provided letters by Dr. Vignes herself which solicited money from the State

Third, Defendants' assertion they did not use race "this time around" fails as a defense both factually and legally. Factually, because Vera Vignes represented to the State that indeed PUSD did use race, and did not give any exception to that policy. E.R. 329, 333. And by the terms of BP 0460 itself, its racial template is imposed on the schools at all times. Legally, as it is a

> well settled rule that a defendant's voluntary cessation of a challenged practice does not deprive a Federal Court of its power to determine the legality of the practice.

Northern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, *supra*, 508 US at 661; see, also, City of Mesquite v. Aladdin's Castle (1982) 455 US 281, 289, and United States v. W.T. Grant Co. (1953) 345 US 629,

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of California for integration funds based upon the racial portions of BP 0460. E.R. 327. This necessarily implies Defendants balanced the student racial mix. In addition, Scott provided declarations which proved that children were denied admittance to the voluntary schools for no other reason than the uncontrolled circumstance of race. E.R. 410 and 413. (These declarations were provided to counsel unsigned – as the Declarants feared retaliation; however, the signed declarations were provided to the district court. Plaintiffs will provide signed copies of the declarations to this Court on request.)

632.[6] PUSD had essentially the same racial policy in place prior to its use of the lottery[7] for the 1998-1999 school year. E.R. 333.

Oddly, PUSD ignores the chronology of events. The original complaint was filed on January 28, 1999. E.R. 1; and the First Amended Complaint was filed on March 29, 1999. E.R. 128. But the lottery was held after said filings; and standing is determined as of the date of filing. Schultz v. PLM Int'l, Inc. (9th Cir. 1997) 127 F.3d 1139, 1141; California Practice Guide: Federal Civil Procedure Before Trial

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[6] Astonishingly, Defendants claimed below that the principle noted here is inapplicable because Defendants never ceased to use the policy. E.R. 314 at lines 12-14. Either way, however, the issue cannot be moot.

[7] Defendants' repeated use of the term "random lottery" is misleading. For the company Defendant hired to implement its lottery reveals in what sense Defendant means random:

> The fundamental theory behind the lottery is simple: an individual student is selected *at random* ... and is considered for his or her effect on the *ethnic balance*. ... targets for *ethnic* or gender *balances* can be by percentages or absolute numbers ... unfortunately, the applying population rarely provides a perfect match for the resources and space available while maintaining a perfect *ethnic balance*. E.R. 397 (emphasis added).

In fact, a perusal of the description of the lottery software reveals racial manipulation is at its heart. For example: "These include lists of available magnet schools, sending or feeder schools and student *ethnicities*." E.R. 396. (Italics added).

(TRG 2000) § 2.1262. As such, Scott was subject to BP 0460 prior to the lottery being conducted (April 7, 1999). E.R. 85-86. This is not a case in which Scott was never subjected to the policy before filing suit and thus has no standing. Rather, Scott was required by BP 0460 to submit an application to the voluntary schools which required racial self identification. E.R. 220. As per the policy, Scott was not able to apply to 100% of the seats for no other reason than the uncontrolled circumstance of race. After the complaint was filed, PUSD claims that it did not consider race in assigning seats this time around. This speaks not to standing; it is an attempt to render the case moot by the voluntary cessation of an illegal activity. PUSD is attempting to twist its voluntary cessation into a standing issue rather than a mootness issue. But

> it is a well-settled rule that a defendant's voluntary cessation of a challenged practice does not deprive a Federal court of its power to determine the legality of the practice.

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, *supra*, 508 US at 661.

And PUSD has steadfastly insisted that it retains the option to use racial criteria for assigning seats to students. As but one token of its continued use of race, the current school application again requires racial self identification. E.R. 389.

Defendants have miscast Plaintiffs' complaint as requiring that they be allowed to attend any school within the district. But while Plaintiffs may not have that right, they do have the right to be considered for such schools "without the burden of invidiously discriminatory disqualifications." Turner v. Fouche (1970) 396 US 346, 362.

As a last point on standing, all Plaintiffs affirmed they intended to apply to the voluntary schools in the future. E.R. 254, 257, 259, and 265. This in itself gives Plaintiffs standing. Northeastern Florida Chapter of the Associated General Contractors of Jacksonville, *supra*, 508 US at 666 ["To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis."]; Bras v. California Pub. Util. Comm'n (9th Cir. 1995) 59 F.3d 869, 873-874, esp. 874 [Plaintiffs' declaration said "in the future [I] stand ready, willing and able to provide services should I be given an opportunity to do so"; the Court concluded that Plaintiffs had standing: "This evidence is sufficient to establish, for purposes of summary judgment, that Bras. will suffer future injury if the program is not enjoined."]

The Supreme Court has defined "injury in fact" regarding equal protection cases. Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, *supra*, 508 US at 666; Regents of the University of California v. Bakke, *supra*, 438 US at 320. And Plaintiffs have proved such injury. Defendants' attempt to re-define the term as if the case involved an automobile accident is in error. Further, their attempt to impose a single meaning on the term with a "one size fits all" mentality is, to invoke a metaphor, pushing a round peg into a square hole. For:

> Injury itself has become a term of the standing art, no more definite than many other terms of art. ...
>
> Standing is recognized nonetheless because courts believe that protection of individual constitutional rights is a central part of the role assigned to the judiciary in the separation of powers.

13 Wright, Miller & Cooper, Federal Practice & Procedure, Jurisdiction 2d § 3531.4.

Under PUSD's scheme, each school child is weighed in the racial balance – and found wanting or adequate based on race. This very weighing is the injury; is, in fact, nothing less than assessing a child's value using a racial yardstick.

III.

THE COURT MAY GRANT RELIEF BEYOND PLAINTIFFS' REQUEST UNDER THE DECLARATORY JUDGMENT ACT

A. The Declaratory Judgment Act allows even unrequested relief.

Defendants assert that the Court had no authority to grant relief beyond that requested. However, the facts and laws are contrary.

First, Plaintiffs' motion requested declaratory relief in a rather broad fashion: "Plaintiffs ... move the Court ... for summary judgment";

> Plaintiff(s) move for declaratory relief on the grounds that Defendants' policy in question violates the U.S. Constitution, Article XIV; and the California Constitution, § 1, Article 31 [sic, but meaning is clear]. E.R. 63-64.

Plaintiffs did not limit their request to certain counts; and the facts of each count were in any case all based on Defendants treating students differently merely because of race.

Second, the Court has authority to grant broad relief where (as here) declaratory judgment is requested:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. 28 USC § 2202.

Influential commentators have echoed the broadness of this grant of power, and the relief may take the form of damages and/or injunction *even though not requested*:

> Accordingly, the rule permits the original judgment to be supplemented either by *damages* or by *equitable relief* even though the coercive relief might have been available at the time of the declaratory action. *It authorizes the Court to grant relief that was not demanded or relief that was not even proved in the original declaratory jud[illegible] action.* Wright, Miller & Kane, Federal Practice and Procedure: Civil 3rd § 2771 [emphasis added].

Defendants' points on this issue are without merit.

B. As a practical matter, Plaintiffs requested relief on all counts.

Defendants argue that, since Plaintiffs did not specifically ask for judgment on all counts, the Judgment was improper on such "omitted" counts. However, this argument fails for reasons even beyond those articulated above.

First, the gist of each count is discrimination on the basis of race. See, e.g., E.R. 11 (lines 4-5):

> [Defendant has] applied policies and procedures relative to determining what types of children can attend which schools within the district based upon race, color, national origin, ethnicity, or gender.

This is incorporated and echoed in each count.[8]

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[8] With the possible exception of count 8, which is a taxpayer action based on CCP § 526a, which merely recognizes that Defendants discriminated on the basis of race and asked for an injunction preventing expenditure of taxpayer money thereon.

Second, Plaintiffs unquestionably asked for judgment on count 5 involving California Constitution, Article I, § 31. This provision is even broader and less tolerant of discrimination than the 14th Amendment of the U.S. Constitution. For while the 14th Amendment does allow discrimination as long as the twin prongs of compelling State interest and narrow tailoring are met, § 31 does not permit such an exception. Since judgment was requested for a statute which articulates the broadest protection against racial discrimination of any statute or constitutional provision articulated in the complaint, the lesser forms of protection, articulated in the other counts, are as a logical matter included in the request. See, California Civil Code § 3536 ("the greater contains the less").

Thus, in logic, as well as in practical effect, Plaintiffs' request for judgment included all counts. Defendants' arguments on this point lack merit.

IV.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT WAS PROPERLY GRANTED.

A. Plaintiffs carried their burdens.

Plaintiffs' burden on summary judgment, given the civil rights context of this action, was to show that Defendants used racial classification as a measuring stick in student admissions. Adarand Constructors, Inc., v. Pena (1995) 515 US 200, 227.

As noted above, the policy above indisputably classifies school children by race. E.R. 342. The policy required the schools at all times to conform to its racial template. *Id*. And Defendants affirm that race was used in their admission programs. E.R. 333. Since Plaintiffs carried that burden, the burden then shifted to Defendants to show that such policy would survive strict scrutiny. See, Miller v. Johnson (1995) 515 US 900, 920; Adarand Constructors, Inc., v. Penn, *supra*, 515 US at 227.

PUSD claims that the issue of "strict scrutiny" was not before the trial court[9], stating, in pertinent part, as follows: "Plaintiffs made no attempt to argue that PUSD's policy could not survive strict scrutiny...." (AOB pp. 41-42). This is simply not true.

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[9] But this was clearly Defendants' burden to raise and prove as shown in § IV-B, *Infra*.

First, Scott raised the issue stating:

> Unless Defendants can justify their use of race by a narrowly tailored "compelling state interest" (which they cannot), such use is unconstitutional. Even if a compelling state interest were found, BP 0460 is not narrowly tailored. E.R. 68.

Second, in Scott's Reply to PUSD's Opposition to the motion for summary judgment, a separate heading on this issue was provided as follows:

> IV. Once Use Of Race Is Proven, As Here, The Burden Shifts To PUSD To Justify Such Use. E.R. 319.

Scott argued as follows:

> The evidence shows PUSD uses race in admissions. As that is the case, the burden now shifts to PUSD to prove a compelling state interest which is narrowly tailored. [Adarand Constructors, Inc., v. Pena, 515 US 200, 227 (1995)]. PUSD has failed to carry this burden. [10]

Plaintiffs raised the issue. But Defendants simply chose not to respond to it.

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[10] PUSD did not designate this portion of the court file.

B. Defendants failed to carry their burdens.[11]

Once Plaintiffs raised the issue of racial classification, the burdens implied by Miller and Adarand, *supra*, thus shifted to Defendants.

First, Defendant had to prove a compelling State interest for racial classification. City of Richmond v. Crosom (1989) 488 US 469, 498;[12] Miller v. Johnson, *supra*, 515 US at 920 ["To satisfy strict scrutiny the State must demonstrate that its ... [law] is narrowly tailored and achieves a compelling interest."]

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[11] Amici have offered evidence as to the propriety of diversity and on other issues. However, the amici cannot make up for Defendants' failure to raise issues or carry its burden of proof on its opposition to summary judgment. Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd. (9th Cir. 1996) 99 F.3d 299, 304.

[12] It is troubling that Defendants, despite the settled case law on this issue, and despite the District Court expressly pointing out to Defendants that Defendants, not Plaintiffs, had the burden on this issue (E.R. 140), yet insist it was Plaintiffs' burden. (AOB 15). Plaintiffs virtually invited Defendants to brief this issue (E.R. 68), but Defendant declined.

It is yet more troubling that Defendants misrepresent a case. In AOB 44, fn 11, Defendants say, regarding Ho, that

> the district court required the plaintiffs to demonstrate the absence of a compelling interest – there, remedying past segregation – and that the program was not narrowly tailored.

But Ho says exactly the opposite, noting the district "court then held that it was the burden of the *defendants* 'to provide a justification for the scheme [of racial classification].'" Ho at 859. (Italics added.)

Ho v. San Francisco Unified School Dist. (9th Cir. 1998) 147 F.3d 854, 865; ["when a governmental body is defending racial quotas, the burden of justification falls on the government."] PUSD's policy cannot pass the strict scrutiny test because it is non-remedial racial balancing. Viewing a similar policy, the Fourth Circuit stated,

> The transfer policy is administered with an end toward maintaining this percentage of racial balance in each school. *This is, by definition, racial balancing*, as we have only recently held in Tuttle "[s]uch non-remedial racial balancing is unconstitutional.

Eisenberg v. Montgomery County Public Schools, (4th Cir. 1999) 197 F.3d 123, citing Tuttle v. Arlington County Sch. Bd. (4th Cir. 1999) 195 F.3d 698. In the present case the court terminated that desegregation of PUSD in 1979. E.R. 330. Thus, BP 0460 is not remedying past official racial animus. But Defendants failed to provide any evidence on that issue.[13] Defendants did hint at diversity as the goal of the policy, but provided no evidence.[14] It is remarkable that, given Defendants' assertion that its racial policy is so necessary to running the district, Defendants did not move to stay the injunction pending appeal.

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[13] Amazingly, Defendants cite Hunter ex rel Brandt v. Regents of Univ. of Cal. (9th Cir. 1999) 190 F.3d 1061 for the proposition that this circuit has approved use of race in school admissions. AOB 43. The District Court's order pointed out the obvious distinction that that case involved a school that was actually a research laboratory. E.R. 146. It is troubling that Defendants would use this case yet again to shore up their faulty proposition.

[14] Whether "diversity" even qualifies as a compelling State interest is doubtful. See, Hopwood v. Texas (5th Cir. 1996) 78 F.3d 932, 944, re-hearing

Defendants also failed to meet their burden to prove that the policy was narrowly tailored. Such burden required an elaborate 5-point analysis. United States v. Paradise (1987) 480 US 149, 171. But Defendants addressed not one point. Not only did Defendants fail to provide evidence; the policy's own language, having no express or implied stopping point, precludes an interpretation of it being narrowly tailored. City of Richmond v. Croson (1989) 488 US 469, 498.

PUSD was required to address the following factors to demonstrate narrow tailoring:

> (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provisions of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties. United States v. Paradise (1987) 480 US 149, 171.

Oddly, PUSD now claims that it submitted evidence that BP 0460 was narrowly tailored. PUSD even states that it

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en banc denied (5th Cir. 1996) 84 F.3d 720, cert. denied 518 US 1033 [holding "diversity" is not a compelling State interest].

> explicitly cited the evidence that its policy was narrowly tailored to achieve a compelling interest in avoiding racial isolation in its Statement of Facts as to Which There is a Genuine Issue. E.R. 112. (AOB pg. 49, footnote 13).

However, a review of the page cited (E.R. 112) reveals that PUSD does not so much as mention "narrow tailoring." Indeed, a review of the entire record reveals that only Scott used that term in the pleadings and papers submitted to the trial court. As such, Judge Tevrizian's observation is correct that,

> ...Defendants have not submitted any evidence or arguments to support a conclusion that a triable issue of fact remains with respect to whether the Policy's racial and ethnic classification[s] are narrowly tailored to meet that purpose [of achieving diversity]... Since Defendants have failed to address these factors [of narrow tailoring], this Court is left to consider them only in light of the undisputed facts before it. E.R. 143.

The trial court notified PUSD of the standard for review under the law (narrow tailoring). PUSD is now arguing that standard for the first time on appeal. PUSD is not a *pro se* party. It did not argue that the policy is narrowly tailored during motions and cross motions for summary judgment. In sum, PUSD declined to argue, much less provide evidence, on this issue. They cannot now rely on their own negligence as a reason to reverse the lower court's decision. PUSD should be estopped from arguing that the policy is narrowly tailored for the first time on appeal.

Even if this Court were to indulge PUSD's arguments in support of narrow tailoring, these arguments simply miss the target. In light of the five factors described in Paradise, the policy is defective.

First, PUSD has offered no evidence as to whether it has tried race-neutral methods in lieu of the policy. As the lower court correctly opined, "It is logically impossible to construct a race-neutral way of accomplishing racial balancing." E.R. 144.

Next, PUSD claims that its annual review of the policy meets the "planned duration factor" regarding a similar policy in the Fourth Circuit.

> The fact that the *County engages in periodic review ... [and the] diversity profile for each school is reviewed and adjusted* each year to avoid the facilitation and the creation of a racially isolated environment does not make the policy narrowly tailored. See Eisenberg, 19 F. Supp. 2d at 455. Instead, it manifests Montgomery County's attempt to regulate transfer spots to achieve the racial balance or makeup that most closely reflects the percentage of the various races in the county's public school population. *Periodic review does not make the transfer policy more narrow.* Eisenberg v. Montgomery County Public Schools (4th Cir. 1999) 197 F.3d 123.[15] (Emphasis added).

PUSD simply ignores the third factor from Paradise, i.e., the relationship between the numerical goal and the percentage of minority group members in the relevant population. There is no evidence as to the "percentage of minority group members." More importantly, PUSD provides no argument, and the policy gives no indication, what percentage is ideal. BP 0460 only seeks to retain a minimum and maximum percentage of persons from each racial and ethnic group that reflects the school district's student population. There are no explanations given why PUSD uses the racial percentages of the student population at the public school district rather than the population of all people within the school district. Further, there is no explanation as to why PUSD views the racial mix which it is seeking to obtain to be ideal. For example, if the number of Hispanics exceeded the percentage allowed for in BP 0460, why specifically is that undesirable? Does a set percentage of Hispanics at a given school harm the students' ability to learn in some quantifiable manner? Nothing has been offered by PUSD to provide a cogent explanation for the necessity for the percentages in BP 0460.

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[15] Maree Sneed, counsel of record herein, was also counsel for the unsuccessful appellee in Eisenberg.

The fourth factor under Paradise is the flexibility of the policy, including the provisions of waivers if the goal cannot be met. The trial court found no provision for waivers in the policy. E.R. 145. PUSD claims for the first time on appeal that paragraph 12 of the policy permits the Board to make exceptions as appropriate in individual cases. (AOB pg 48). Giving PUSD the benefit of the doubt that they brought this to the trial court's attention, the paragraph in question does not redeem the policy. A review of paragraph 12 shows that it does not provide the terms for waivers. It simply says that the Board

> may make exceptions to the criteria...in considering the criteria cited in the District's Intradistrict permit/transfer policy. (PUSD Addendum at 9).

Paragraph 12 does not state what constitutes the qualifications for a waiver. Children who appeal the decision to deny them a seat because of the uncontrolled circumstance of race are provided no clue as to what they need to demonstrate to the Board to obtain a waiver.

PUSD simply has the process backwards. It is the school District which must demonstrate that there is a compelling reason to prevent a child from applying to 100% of the seats because of race. City of Richmond v. Crosom, *supra*, 488 US at 498. A child should not have to show that he or she has a good enough reason as to why the racial qualifications should be waived as to him or her. As one court explained,

> We find it ironic that a Policy that seeks to teach young children to view people as individuals rather than members of certain racial and ethnic groups classifies those same children as members of certain racial and ethnic groups. Tuttle v. Arlington County Sch. Bd. (4th Cir. 1999) 195

F.3d 698, 707.[16]

The fifth factor under Paradise is the burden of the policy on innocent third parties. As the trial court opined, the innocent third parties are,

> young elementary school children who, by absolutely no fault of their own, are part of a racial or ethnic group who make up a larger part of the applicant pool to the voluntary schools than they do the school district as a whole. E.R. 145.

In sum, Plaintiffs carried their burden and showed indisputably that the policy classified students on the basis of race. Defendants failed to address their burden. Judgment was thus properly granted to Plaintiffs.

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[16] Defendants' counsel, Hogan & Hartson, also represented appellant in Tuttle.

V.

ELEVENTH AMENDMENT IMMUNITY[17] DOES NOT SHIELD DEFENDANTS FROM CLAIMS.

A. Defendants failed to properly raise 11th Amendment immunity, and so have waived it.

Defendants wish to discuss 11th Amendment immunity on appeal. However, Defendants never mentioned, much less provided evidence on, this issue in their motion for summary judgment, their reply, or their opposition to Plaintiffs' motion for summary judgment. Nor did they raise 11th Amendment immunity as an issue in their initial 12-b motion.[18] Moreover, Defendants never mentioned immunity as an issue in either of their notices of appeal or their "statement of issues appellants intend to raise on appeal." E.R. 160, 184, 445. They have thus waived the issue of immunity.

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[17] Defendants clearly limit their arguments to 11th Amendment immunity, though inartfully using the term "sovereign immunity" interchangeably. Thus, Plaintiffs will only speak to the 11th Amendment issue. 11th Amendment immunity is, in any case, distinct from sovereign immunity. Alden v. Maine (1999) 119 S.Ct. 2240, 2254. In any case, sovereign immunity is also an affirmative defense. Nevada v. Hicks (9th Cir. 1999) 163 F.3d 1020, 1029.

[18] The record designated by Defendants in fact shows no evidence that this issue, which is an affirmative defense, was even raised in its answer.

It was incumbent on Defendants to raise this issue at the earliest opportunity. E.E.O.C. v. Farmer Brother's Co. (9th Cir. 1995) 31 F.3d 891, 901, fn.6. But they did not raise it on their 12-b motion; on their motion for summary judgment or the reply; or in their opposition to Plaintiffs' motion for summary judgment. While the Court has discretion to consider an issue brought to the District Court's attention by post judgment motion, it is proper to decline such discretion where, as here, the issue could have been raised earlier and no good reason exists for Defendants' failure to do so. Beech Aircraft Corp. v. United States (9th Cir. 1995) 51 F.3d 834, 841. [Court of Appeal held that the fact that Appellants "raised the issue in a post-judgment motion does not save the issue for appeal."]; see, also, Intercontinental Travel Marketing v. FDIC (9th Cir. 1994) 45 F.3d 1278, 1286. [Raising issue for first time in motion to reconsider grant of summary judgment "is not considered adequate preservation of the issue at the summary judgment stage."] It is yet more proper to decline review of an issue where that issue was not raised in opposition to a motion for summary judgment. Komatsu Ltd. v. States S.S. Co. (9th Cir. 1982) 674 F.2d 806, 812:

> States gives no reason for its failure to raise this issue prior to the district court's entry of partial summary judgment. Under such circumstances, an appellant may not overturn a summary judgment by

> raising an issue of fact on appeal that was not plainly disclosed as a genuine issue in the trial court.[19] [Cite omitted.] Remand on this issue is therefore inappropriate.

See, also, Kline v. Johns-Manville (9th Cir. 1984) 745 F.2d 1217, 1221.

And such reasoning is yet stronger with regard to the 11th Amendment.

First, the 11th Amendment is an affirmative defense. Hill v. Blind Industries & Services of Maryland (9th Cir. 1999) 179 F.3d 754, 760. And

> an entity invoking 11th Amendment immunity bears the burden of asserting and proving those matters necessary to establish its defense.

Hill v. Blind Industries & Services of Maryland (9th Cir. 2000) (petition for re-hearing denied) 201 F.3d 1186.

Second,

> [a] failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case.

Wright & Miller, Federal Practice & Procedure: Civil 2d, § 1278; see, also, Harbeson v. Parke Davis, Inc. (9th Cir. 1984) 746 F.2d 517, 520; Santos v. Alaska Bar Ass'n (9th Cir. 1980) 618 F.2d 575, 576-577; and Brannan v. United Student Aid Funds, Inc. (9th Cir. 1996) 94 F.3d 1260, 1266; cert. den. 521 US 1106 and 521 US 1111.

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[19] Defendants did not raise this in its "Statement of Facts as to which there is a genuine issue." E.R. 112.

Here, the record shows no evidence Defendants pleaded that defense.

Third, timely assertion of the defense is crucial to preserving it:

> Indeed, our recent decisions often have focused on whether the State timely asserted its Eleventh Amendment defense. Hill, *supra*, 179 F.3d at 763.

In Hill, Defendant raised its 11th Amendment argument on the first day of trial. The Court found such lateness waived the defense. This Court affirmed the waiver in strong language. A party (such as PUSD) which participates in a lawsuit for months on end

> cannot run back to seek Eleventh Amendment protection when it does not like the result.

Id. at 758-759.

And a state will

> waive [its] Eleventh Amendment protection by voluntarily appearing and defending on the merits [provided] the State has been adequately notified of the pendency of the suit and of the particular matters at issue.

Id. at 759, quoting Fordyce v. City of Seattle (9th Cir. 1995) 55 F.3d 436.

And, finally,

> to permit a defendant to litigate the case on the merits, and then belatedly claim Eleventh Amendment immunity to avoid an adverse result would "work a virtual fraud on the Federal court and opposing litigants." Hill, 179 F.3d at 758, quoting Newfield House, Inc. v. Mass.

Dept. of Pub. Welfare (1st Cir. 1981) 651 F.2d 32, 36 (n.3).

The facts here are even more compelling of waiver than in Hill. For in Hill, defendant claimed the defense *before* trial; here, Defendants claimed it only *after judgment had been entered,* which was over a year after filing of the case. Defendants have thus certainly waived this defense.

B. Individual Defendants cannot claim immunity.

1. Defendants failed to carry their burden.

The burden falls on Defendants to plead and prove qualified immunity. Gomez v. Toledo (1980) 446 US 635, 640; Siegert v. Gilley (1991) 500 US 226, 231; De Nieva v. Reyes (9th Cir. 1992) 996 F.2d 480, 486. But Defendants made no showing[20] and brought forth no evidence supporting such a proposition. But Defendants had precisely this obligation – to produce evidence in their opposition to Plaintiffs' motion for summary judgment. Celotex Corp. v. Catrett (1986) 477 US 317, 324. Such utter failure forecloses them from now arguing immunity.

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[20] Defendants chose not to designate their answer, which is thus not before the Court. The failure to provide an adequate record "may well result in dismissal of the appeal or other sanctions." Hall v. Witley (9th Cir. 1991) 935 F.2d 164, 165; Syncom Corp. v. Wade (9th Cir. 1991) 924 F.2d 167, 169.

2. Defendants cannot claim 11th Amendment immunity.

All individual Defendants were sued in their individual capacity, and thus cannot claim 11th Amendment immunity against § 1983 actions. Hafer v. Melo (1991) 502 US 21, 25; see, also, Scheuer v. Rhodes (1974) 416 US 232, 237.

3. Defendants do not pass the threshold query of Harlow v. Fitzgerald.

Defendants claim qualified immunity. However, even if this Court were to ignore Defendants' clear waiver of this issue, the individual Defendants cannot claim qualified immunity.

Qualified immunity does not apply where Defendants' conduct

> violates clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald (1982) 457 US 800, 818.

This is clearly applicable to school board members. Wood v. Strickland (1975) 420 US 308, 322.

And the 9th Circuit held 20 years ago that the

> constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that *all public officials must be charged with knowledge of it.*

Flores v. Pierce (9th Cir. 1980) 617 F.2d 1386, 1392 [citing Cooper v. Aaron (1958) 358 US 1] cert. den. (1980) 449 US 875 (italics added).

Board Policy 0460 blatantly discriminates against students because of their race. And it has been clear for at least 57 years that

> distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

Hirabayashi v. United States (1943) 320 US 81, 100.

In Wade v. Hegner (7th Cir. 1986) 804 F.2d 67, a school principal discouraged a parent from enrolling his child at the school solely because of race. A commentary objectively and succinctly summarizes the case:

> The 7th Circuit held that the District Court correctly ruled that the defendant was not protected by qualified immunity. The law *prohibiting racial discrimination in connection with public school admissions* was clearly settled for more than 30 years.

2 Nahmod, Civil Rights & Civil Liberties Litigation - The Law of Section 1983 (The West Group 1997) § 8.32 (emphasis added).

Defendants really should not be allowed to raise the issue of immunity, given their utter failure to do so below. But even if such were considered on the merits, it would fail.

C. PUSD has failed to prove immunity.

Defendant PUSD now claims absolute immunity. Such is an affirmative defense. Nevada v. Hicks (9th Cir. 1999) 163 F.3d 1020, 1029. But Defendant made no mention of sovereign immunity in its opposition to Plaintiffs' motion for summary judgment; much less did it put forth evidence. In view of Defendants' utter failure to make such a showing, PUSD should not be allowed to raise, much less argue, immunity on appeal.

D. The injunctive claims trump 11th Amendment immunity.

Eleventh Amendment immunity, as far as respects prospective relief, is trumped by Federal claims. An action, as this one, that results in a Federal Court order requiring the State's compliance with Federal law to alleviate a continuing violation does not run afoul of the 11th Amendment. Papasan v. Allain (1986) 478 US 265, 282; see, also, Doe v. Lawrence Livermore Nat. Laboratory (9th Cir. 1997) 131 F.3d 836, 839. The principle behind this is to vindicate the supremacy cause of the Constitution. 2 Civil Actions Against State and Local Government (2nd ed. West Group 1992) § 10.23. This is certainly true of the counts based on Federal law; but it is likewise true of the State law counts as most, if not all, of the causes of action were derivative of the 14th Amendment or expressly incorporated the 14th

Amendment.[21] The principle of looking to substance rather than form (Civil Code § 3528) becomes applicable.

The only State law claims are Article I, §§ 7-8, and 31, of the California Constitution, California Code of Civil Procedure § 526a, and California Civil Code § 51. Despite Defendants' waiver of the issue, should the Court indulge in considering PUSD's arguments of immunity, most of the State causes of action involve federal issues, i.e., they are triggered by violations of the federal equal protection clause. For example, Article I, § 7, by its very terms, incorporates the 14th Amendment when it states as follows:

> In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th

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[21] This would include count 2 [42 USC § 1985, Conspiracy to deprive plaintiffs of having and exercising a right or privilege of a citizen of the United States on account of their race ...]; count 3 [implied 14th Amendment]; count 4 [14th Amendment expressly within the count]; count 6 [14th Amendment expressly within the count]; count 7 [14th Amendment expressly within the count]; count 8 [implied as CCP § 526a is an enabling statute, and is derivative of rights claimed under other statutes, including the 14th Amendment, which has been incorporated by reference]; count 10 [14th Amendment expressly included in count]; count 12 [14th Amendment expressly included in count].

Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Moreover, CCP § 526a (count 8) is a State cause of action which must allege a violation of law. In the present case Scott has alleged in the complaint that PUSD's acts are in violation of the federal Constitution. E.R. 19. In addition, Scott's State cause of action under CC §§51-52 also allege violations of the U.S. Constitution. E.R. 20. As per CC §52(d), the 14th Amendment has been incorporated into the statute by reference. Therefore, the doctrine of immunity ought not apply.

As to Article I, § 31, and Article I, § 8, they also raise federal issues. The equal protection clause of the 14th Amendment is incorporated into these sections by virtue of the above quoted section of Article I, § 7. The pertinent language is, "in enforcing this subdivision or any other provision of this Constitution...." (Emphasis added). Section Seven then specifically cites the equal protection clause of the 14th Amendment.

In sum, each and every State cause of action specifically deals with a federal issue, i.e., a violation of the equal protection clause of the 14th Amendment. Therefore, none of the Defendants have immunity under the 11th Amendment at least as to the injunction.

VI.

CONCLUSION

Racial classification has been marked as the evil it is by the Supreme Court:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

Hirabayashi v. United States (1943) 320 US 81, 100.

Defendants argue they may judge persons on the basis of race. Defendants and their *amici* argue that their wisdom should take the ascendancy over the words of Martin Luther King, Jr., when he expressed his dream in 1963 that one day all American children would be judged not by the color of their skin but by the content of their character. Plaintiffs maintain that Martin Luther King, Jr., was right; that the Constitution means what it says, and that race should not be used when deciding to admit or not admit school children to particular schools. The Judgment below should be affirmed.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Plaintiffs/Appellees/Cross-Appellants, state that they are aware of no other cases pending in this Court that (a) arise out of the same or consolidated cases in the District Court; (b) are cases previously heard in this Court which concern the case being briefed; (c) raise the same or closely related issues; or (d) involve the same transaction or event.

ANSWER TO AMICUS BRIEFS

INTRODUCTION

The amici generally attempt to expand the domain of the Court's consideration. While Plaintiffs welcome the varied viewpoints of amici, they cannot make up for Defendants' failure to raise issues and produce evidence at summary judgment which are the crucial and exclusive issues in this appeal. Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd. (9th Civ. 1996) 99 F.3d 299, 304.

Give the rather rarified and academic environment of amici and the nature of their briefs being more arguments for policy changes than pointing out facts or law that brand the district court with error, Plaintiffs will respond briefly to each amicus.

ANSWER TO BRIEF OF EDUCATION LEGAL ALLIANCE

In general, amicus elevates diversity over the Constitution. Amicus would have schools teach children a mixed message: "You are precious regardless of your color; but we must still take your color into account in assigning you to school." The message that students will get, of course, is that they are still grouped by their race. This is the very situation abhorred by the Supreme Court in Hirabayashi v. United States (1943) 320 US 81, 100.

Amicus speaks of diversity as a virtue. It may or may not be. But racial classification, as amicus urges, does not necessarily lead to a harmonious, multi-cultural community. The Supreme Court has noted truly and bluntly as follows:

> [Racial distinctions] threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. Shaw v. Reno (1993) 509 US 630, 643.

ELA (at page 3 and following) frequently uses the phrase "equal educational opportunity." If children cannot apply to all 100% of available seats (as is the case under BP 0460), it is impossible for educators to provide an "equal educational opportunity" for all children. To use an Orwellian phrase, "some will be more equal than others."

ELA next asserts (at pages 7-9) that education is a compelling state interest. PUSD never raised this as a defense below and amicus cannot argue it for Defendants now. Commodity Futures Trading Comm'n v. Frankwell Bullion Ltd., *supra*.

Further, even if that is true, there is no authority for the proposition that such a compelling state interest is strong enough to justify "racial balancing" or indeed has anything to do with it.

ELA next argues (at pages 10-17) that "diversity" and "preventing racial isolation" are compelling state interests. These are simply racial balancing and "non-remedial racial balancing is unconstitutional." Eisenberg v. Montgomery County Public Schools (4th Cir. 1999) 197 F.3d 123, citing Pasadena Bd. of Educ. v. Spangler (1976) 427 US 424, 436, and Freeman v. Pitts (1976) 503 US 467, 480. And Defendants did not raise, much less support, these issues. ELA cannot make up for Defendants' defects.

ELA next (at pages 14-17) opines that BP 0460 is a remedy for past discrimination. But PUSD never asserted that the policy is in place to avoid the harmful effects of past discrimination. E.R. 146. Moreover, the order was lifted in 1979. E.R. 332. The children involved had not even been born at that time. Again, ELA cannot make up for Defendants' defects.

ELA next claims (at pages 17-20) that the U.S. Department of Education's Title VI regulations require the type of racial classifications found in BP 0460. If that were true, then the Title VI regulations would be unconstitutional. In this instance, however, if amicus is claiming that BP 0460 was passed pursuant to Title VI, which it was not, then PUSD's interpretation of Title VI is unconstitutional. ELA cites Monteiro v. Tempe Union School District (9th Cir. 1998) 158 F.3d 1022, 1034. Monteiro was a case in which black students unsuccessfully brought suit seeking to prohibit the use of certain books authored by Mark Twain which frequently used a racial epithet. This court found for the school district based upon the free speech clause of the First Amendment. ELA's reliance on Monteiro is simply off point. Finally, ELA quotes the language from the floor debate on Title VI which states, in pertinent part, as follows: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." Lau v. Nichols (1974) 414 US 563, 594, quoting Senator Hubert Humphrey. The above language articulates why Judge Tevrizian was correct in noting that, if anything the pertinent regulations of Title VI (34 C.F.R. § 100.3(b)(2)) may in fact be violated by PUSD as a result of BP 0460. E.R. 150.

ELA next attempts (at pages 22-24) to argue for PUSD that BP 0460 should survive strict scrutiny because it is narrowly tailored to achieve a compelling state interest. First, ELA entirely ignores the five factors to be considered under Paradise.

Second, it cannot make up for Defendants' failure to support these issues at summary judgment.

ELA then argues (at page 22) that the choices of parents who wish to send their children to magnet schools "may become instruments of segregation." ELA's argument simply ignores the U.S. Supreme Court's view that private choices are not state action by their very nature and thus do not have constitutional implications. Freeman v. Pitts (1992) 503 US 467, 495. Further, in an attempt to convince this Court that Freeman v. Pitts is no longer good law, ELA relies on Santa Fe ISD v. Doe (June 9, 2000) 2000 WL 775587. But that case involved prayer at public schools in which the student body voted for or against prayer. Santa Fe ISD is not on point and does not reverse Freeman v. Pitts.

ANSWER TO BRIEF OF ACLU

ACLU claims (at page 5) that the lower court ignored Bakke and Hunter v. Regents of the University of California (9th Cir. 1999) 190 F.3d 1061. The lower court discussed Hunter in its opinion. E.R. 146. Further, the court quoted from Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville (1992) 508 US 656, 666. E.R. 135. The section of Northeastern

Florida quoted by the lower court specifically cites Bakke. Judge Tevrizian cited a case which relies on Bakke. The lower court merely chose to cite the more recent Supreme Court case for the law. In sum, the law in Northeastern Florida is the same as Bakke; and the district court discussed it at length.

Next, the ACLU states (at page 5) that the lower court ignored "recent social science literature." This literature is not the law and was not submitted by PUSD. The lower court committed no error in not considering said literature. Further, the U.S. Supreme Court has rejected the "role model" argument as is described in the social science literature. See City of Richmond v. J.A. Croson Co., *supra*, 488 US at 497-98 (plurality opinion); Wygant v. Jackson Board of Education (1986) 476 US 267 (plurality opinion).

Next, the ACLU (on pages 6-8) relies heavily on the "reshuffle" versus "stacked deck" description of certain affirmative action programs as described in Associated General Contractors of California v. San Francisco Unified School District (9th Cir. 1980) 616 F.2d 1381. A review of that case shows that, even if this court were to give consideration to these concepts, BP 0460 is a "stacked deck" policy similar to the one found unconstitutional in Bakke.

> We think it is useful and necessary to distinguish between the two major types of positive governmental action taken on behalf of minorities. First, there are "reshuffle" programs, in which the state neither gives to nor withholds from anyone any benefits because of that person's group status, but rather ensures that everyone in every group enjoys the same rights in the same place. The most common examples are school desegregation cases and programs.
>
> Second, there are 'stacked deck' programs, in which the state specifically favors members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all. This category includes affirmative action programs of both the quota and 'positive-factor' varieties (but not programs that merely encourage more minority persons to apply for state-conferred benefits).

PUSD does not assert that the policy attempts to remedy the past harmful effects of racial discrimination. Further, the present case is similar to Bakke in which a student cannot apply to 100% of the seats. Thus BP 0460 is a "stacked deck" policy. In addition, Associated Contractors was a case in which the race conscious policy of a school district was found to be unconstitutional. Finally, PUSD never asserted that its Voluntary Integration Policy is a "reshuffling program." This is simply not an issue that is properly before the Court.

Next, the ACLU (at page 8) relies on dicta from Coalition for Economic Equity v. Wilson (9th Cir. 1997) 122 F.3d 692, 707 for the idea that "reshuffle" programs are appropriate in the school setting. Again, that issue was not before the lower court.

Further, this case is similar to Bakke in that students cannot apply to 100% of the seats. Bakke was a "stacked deck" program and so is PUSD's.

Next, the ACLU (at page 20) cites Brewer v. West Irondequoit Central School Dist. (2nd Cir. 2000) 212 F.3d 738 for the proposition that consideration of race can be used for nonremedial reasons. Brewer, however, involved a preliminary mandatory injunction rather than a summary judgment. Second, the Brewer court found that there was a factual issue of whether there was de facto segregation. This issue, of course, is not present in this case.

At footnote 10 (on page 20), the ACLU misstates the record stating that race will only be considered if a child applies to an entering grade. On its face, the policy has no such limitation. In fact, the policy expressly applies to transfers. E.R. 392.

Next, the ACLU's reliance (on page 20) on Hunter is entirely misplaced. PUSD operates a public school system which is open to any child residing within the district. PUSD is not a laboratory school as was the school in Hunter.

Next, the ACLU (at pages 21-22) gives lengthy citations for the proposition that "public institutions may in some circumstances consider race to further nonremedial objectives." A review of the citations shows that the cases do not provide support for the ACLU's proposition. For example, Eisenberg and Wessman both rejected the nonremedial uses of race in public school assignments. Buchwald v. University of New Mexico Medical School (10th Cir. 1998) 159 F.3d 487 did not deal with race at all. The case involved the issue of whether long term residents of a state can receive favorable treatment. Moreover, each applicant could apply for every seat at the medical school. Wittmer v. Peters (7th Cir. 1996) 87 F.3d 916, was an employment case which involved the unique situation of prisons operation. Taxman v. Piscataway Board of Education (3rd Cir. 1996) 91 F.3d 1547, was an employment case which found racial preferences to be unconstitutional. O'Donnell Construction Co. v. District of Columbia (D.C. Cir. 1992) 963 F.2d 420, involved the awarding of construction contracts. In that case, the racial set asides were found to be unconstitutional. Amicus' citations are impressive on paper but fail on examination.

ANSWER TO BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION

Amicus begins by misstating the facts. It says, "personal factors" – by which it means race – "could be used only for the entering grades of the voluntary school – not for upper grade transfers or other special circumstances." (Page 2). But the policy expressly applies to transfers as well as entering grades and nowhere limits itself to entering grades. E.R. 342, ¶¶ 3,5.

Amicus next says that the U.S. Supreme Court has tailored special constitutional rules for grades K through 12. (Page 3). The subtext necessarily means that children should not be beneficiaries of the 14th Amendment. Amicus argues that strict scrutiny should not apply where kids are concerned. This flies in the face of the true position of the Court which is:

> Accordingly, we hold today that *all* racial classifications imposed by whatever Federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Adarand Constructors, Inc. v. Pena (1995) 515 US 200, 227 (italics added).

Plaintiffs submit that where the Supreme Court says "all," it means "all."

Amicus next says that educational decisions should be left to school boards to decide without the Constitution meddling therewith. This is contrary to law. Miller v. Johnson (1995) 515 US 900, 910; Richmond v. Croson (1989) 488 US 469, 501. This attitude is also hauntingly reminiscent of President Johnson's veto of the Civil Rights Bill of 1866 (14 Stat 27). In essence, the Act forbade any different treatment of a person "by reason of his color or race." President Johnson vetoed the Act and, in justifying his veto, noted the following:

> In no one of these [areas covered by the Act] can any state ever [again] exercise any power of discrimination between the different races. In the exercise of state policy over matters exclusively affecting the people of each state, it has frequently been thought expedient to discriminate between the two races. By the statutes of some of the states, northern as well as southern, it is enacted, for instance, that no white person shall inter-marry with a Negro or Mulatto.

6 Richardson, Messages and Papers of the President (1897) 405.

In other words, it is the State's business (and no one else's) as to whether they discriminate. If one were to substitute the term "school district" for the term "state" in President Johnson's statements, the parallel becomes clear. The response of Senator Trumbull to Johnson's veto would be just as germane today:

> How preposterous, then, to charge that unless some state can have and exercise the right to punish somebody, or to deny somebody a civil right on account of his color, its rights as a state will be destroyed.

Cong. Globe, 39th Cong., First Sess. (Senate) 1761.

ANSWER TO BRIEF OF UNITED STATES

This amicus recounts, and wishes this Court to reconsider, the failed arguments made by Defendant below. Notably amicus asserts that Defendants "did not classify or treat Plaintiffs (or any applicants) differently based upon their race, ethnicity, or gender in selecting students for the voluntary schools in 1999." (Page 15). However, the application for the schools automatically classifies children by race. E.R. 220. Each child is measured as to his or her effect on the schools' racial make-up. This is required to execute the policy, which gives upper and lower permitted percentages of each race. E.R. 342, ¶3. The children, by being subject to such measurement, have sustained the injury-in-fact contemplated by Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville (1993) 508 US 565, 666. Amicus cites Moose Lodge No. 107 v. Irvis (1972) 407 US 163 for the proposition that applying is the *sine qua non* for standing. But that case was decided over two decades before Northeastern Florida; and the roles on standing have developed to include Plaintiffs' situation.

In any case, it is undisputed that Plaintiff George MacPherson applied. And this fact, as noted in Plaintiffs' answering brief, is sufficient to confer standing on co-Plaintiffs. Even if George MacPherson alone had standing, the injunction and judgment would still stand. But the fact that all Plaintiffs affided that they were ready and able to apply in the future [E.R. 254, 257, 259, 265] also confers standing. Bras. v. Cal. Pub. Util. Comm'n (1995) 59 F.3d 869, 873-874.

CONCLUSION

Amici's arguments are generally interesting. However, their attempts to place evidence or issues before this Court to make up for Defendants' failure to do so below are not permitted. In any case, their arguments do not work to reverse the district court's judgment.

Respectfully submitted,

Dated: August 31, 2000

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Nos. 00-55532, 00-55666 and 00-55789

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SYLVIA SCOTT, et al.
Plaintiffs/Appellees/Cross-Appellants

v.

PASADENA UNIFIED SCHOOL DISTRICT, et al.
Defendants/Appellants/Cross-Appellees

Appeal from the United States District Court
for the Central District of California

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION

IN SUPPORT OF PASADENA UNIFIED SCHOOL DISTRICT

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Bethel School District No. 403 v. Fraser,
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Bills v. Homer Consolidated Sch. Dist. No.33-C,
967 F.Supp.1063 (N.D. Ill. 1997) 9

Board of Educ. Of Borough of Englewood Cliffs, Bergen County v. Board of Educ. Of City of Englewood, Westlaw 2000, WL 1006089
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Board of Educ. of Hendrick Hudson Central Sch. Dist. v.Rowley,
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Brown v. Board of Education,
347 U.S. 483 (1954) .... *passim*

Edwards v. Aguillard,
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Eisenberg v. Montgomery County Public Schools,
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Epperson v. Arkansas,
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Freeman v. Pitts,
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Goss v. Lopez,
419 U.S. 565 (1975) 9,13

Grutter v. Bollinger,
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Hazelwood School Dist. v. Kuhlmeier,
484 U.S. 260 (1988) 8

Herndon v. Chapel Hill-Carboro City Bd. of Educ.,
89 F.3d 174 (4th Cir. 1996) 9

Ho v. San Francisco NAACP,
576 F. Supp. 34 (N.D. Cal. 1983) 26

Hopwood v. State of Texas,
78 F.3d 932, reh'g en banc denied, 84 F.3d 720 (5th Cir.), cert denied,
518 U.S. 1033 (1996) 11

Hunter v. Regents of the University of California,
190 F3d 1061 (9th Cir. 1999) 14,15

Ingraham v. Wright,
430 U.S. 651 (1977) 9

Johnson v. Board of Regents of the University System of Georgia,
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Kadrmas v. Dickinson Public Schools,
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McCollum v. Board of Educ.,
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New Jersey v. T.L.O.,
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Plyler v. Doe,
457 U.S. 202 (1985) 9

Richmond, City of v. J.A. Croson,
488 U.S. 469 (1989) 10

School Dist. of Abington Township v. Schempp,
374 U.S. 203 (1983) 12

Scott v. Pasadena Unified School District,
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Spangler v. Pasadena City Board of Education,
611 F.2d 1239 (9th Cir. 1979) 24

Steirer v. Bethlehem Area Sch. Dist.,
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Swann v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 1 (1971) 14

Tinker v. Des Moines Community School Dist.,
393 U.S. 503 (1969) 8,9

United States v. Kozminski,
487 U.S. 931 (1988) 9

Wood v. Strickland,
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U.S. CONST. amend. VIII 9
U.S. CONST. amend. XIII 9
U.S. CONST. amend. XIV 9

STATUTES:

20 U.S.C. § 7201 30

OTHER AUTHORITIES:

Carol Ascher, *The Changing Face of Racial Isolation and Desegregation*, ERIC Clearinghouse on Urban Education, New York, NY(1993) 27

J. Braddock, , R. Crain, & J. McPartland, *A Long Term View of School Desegregation: Some Recent Studies of Graduates as Adults* (Phi Delta Kappan, December 1984). 20,28

William R. Brown and Martin Patchen, *Assessing Measures of Contact Theory*, ERIC Database (1982) 21,22

Cohorts, Education, and the Evolution of Tolerance, Social Science Research Science Research, 205, (1998) 23

Compelling Interest: Examining the Evidence of Racial Dynamics in Higher Education, A Report of the AERA on Racial Dynamics in Colleges and Universities,(Mitchell Chang, *et al.*, eds., 1999) 19

Robert L. Crain and Rita E. Mahard, *Minority Achievement: Policy Implications of Research*, Effective School Desegregation: Equity, Quality and Feasibility (Willis D.Hawley, ed., 1981) 17

Robert L. Crain and Jack Strauss, *Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (1985) 18

Colleen Krantz, *'White Flight' Burden Rural Schools,* The Des Moines Register, July 27, 2000 29

Jennifer Hochschild, *Is School Desegregation Still a Viable Policy Option?* Political Science & Politics (1997) 23

Poppy Lauretta McLeod, Sharon Alisa Lobel, Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups* Small Group Research, Vol. 27, No.2, May 1996 18

James M. McPartland and Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation* , Effective School Desegregation (Willis D. Hawley, ed., 1981) 18

National Education Association, The Benefits of A Racially-Diverse Student Body In Elementary/Secondary Education (1999) 15

Jenny Oliver & Craig Howley, *Charting New Maps: Multicultural Education in Rural Schools*. ERIC Digest (1992) 8

G. Orfield, M. Bachmeier, D.R. James, & T. Eitle, (September 1997). *Deepening segregation in American public schools*: A special report from the Harvard Project on School Desegregation. Equity and Excellence in Education. 25,27

Gary Orfield, & John T. Yun, *Resegregation in American Schools* (June 1999), The Civil Rights Project, Harvard University. http://www.law.harvard.edu/groups/.../publications/ resegregation99.html. 25

Reaching the Top: A Report of the National Task Force on *Minority Achievement,* The College Board (1999) 29

Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students,* Handbook on Research on Multicultural Education (James A. Banks, ed., 1995) 20

Janet Ward Schofield, et al. *The Evolution of Peer Relations in a Desegregated Middle School* (1979) 23

Janet Ward Schofield and H. Andrew Sagar, *Desegregation, School Practices and Student Race Relations,* p. 59, in The Consequences of School Desegregation (Christine H. Rossell *et al.,* eds., Temple University Press 1983) 22

Peter Schrag, *The Diversity Defense, THE AMERICAN PROSPECT,* September 1, 1999 25

Robert E. Slavin, *Cooperative Learning and Intergroup Relations,* in Handbook of Research on Multicultural Education, 628 (James A. Banks, ed. 1995) 17

The Role of Social Science in School Desegregation Efforts: The St. Louis Example, 66 Journal of Negro Education 195 (1997) 18

David S. Tatel, Desegregation Verus School Reform: Resolving the Conflict, 4 STAN. L. & POL'Y REV. 61 28

W.T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics,* 31(2) Int'l Journal of Contemporary Sociology 273 (1994) 19

U.S. Census Bureau, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050 reprinted in* U.S. Department of Commerce, Minority Business Development Agency, "The Emerging Minority Marketplace" (1999) 7

U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1998* 2,25,26

U.S. Department of Education, Secretary Riley on the Occasion of the 45th Anniversary of *Brown v. Board of Education,* May 17, 1999 21,25

Jeanne Weiler, *Recent Changes in School Desegregation.* ERIC Digest (1998) 27

Amy S. Wellans and Robert Crain, Stepping Over The Color Line: African American Students In White Suburban Schools (1998) 22

INTEREST OF *AMICUS CURIAE*

The National School Boards Association[1] (NSBA) is a nonprofit federation that represents the nation's 95,000 school board members, who in turn serve more than 90 percent of the K-12 students in the United States. NSBA has had a long interest in the effective development and implementation of local school board policies, including those that set student enrollment standards and procedures as a means to achieve educational objectives. NSBA's belief that racial isolation is harmful to the education of all students is outlined in its Beliefs and Policies:

> "School boards should strive to recognize the special needs and strengths of every student to facilitate student access to a high-quality education in a safe and supportive environment."
>
> -- Article II, Section 3.3: *Diversity and Flexibility*
> (Adopted March 31 & April 3, 2000)
>
> "The United States is a complex, racially diverse society. School boards should take positive action to support integration, provide equality of educational opportunities, and eliminate from educational materials and from district procedures stereotyping of women, minorities, immigrants and migrants. The total school environment, including its curriculum, should reflect the multicultural nature of the world."
>
> -- Article II, Section 3.5: *Quality Integrated Education*
> (Adopted March 31 & April 3, 2000)

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[1] This brief is submitted with the consent of all parties and was written by National School Boards Association, and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

The Pasadena Unified School District (PUSD) operates three voluntary magnet schools. Admission to those schools is granted pursuant to the district's "Integration Policy and Quality Schooling Plan" ("BP 0460"), which permitted officials to consider race and other personal characteristics in circumstances where the applicant pool lacked the diversity necessary for an effective learning environment. Only when racial diversity was absent from the applicant pool was PUSD permitted under BP 0460 to use a weighted lottery system. Personal factors could be used only for the entering grades of the voluntary schools – not for upper grade transfers or other special circumstances. This minimally intrusive fail-safe system would have been used to avoid either compromising on diversity or contributing to racial isolation in PUSD's three magnet school buildings.

This case is important to school districts nationwide because it raises a critical legal issue: *Can a local school board take intentional steps to create a diverse learning environment?* PUSD has persuasively demonstrated, however, that despite the ruling below this issue was not before the district court since it was never properly raised in plaintiffs' motions. Therefore, the court may decide this case without ever reaching the substantive question we address.

SUMMARY OF THE ARGUMENT

All of the plaintiffs lack standing to pursue their claim, and the district court's judgment should therefore be reversed on that basis. We hereby incorporate by reference PUSD's standing argument as stated on pages 17-39 of its "Brief for Appellants Pasadena Unified School District, *et al.*"

In the event the court is determined to reach the core issue, it is both proper and constitutional for public school districts to consider diversity as a factor in assigning students to programs. That approach is consistent with the larger mission of public education to prepare students for citizenship and to provide them with all of the information and experiences that will equip each child for economic success in both the U.S. and world economies.

It is this mission that makes the K-12 setting unique. The U.S. Supreme Court and other courts have clearly recognized that K-12 is a special environment and have therefore tailored special constitutional rules to apply only in that context. The same should be said of the authority to weigh race as an educational factor in student assignments. The confines of strict scrutiny, if used at all, should be balanced with the school's educational mission of providing a diverse learning environment.

Educational decisions are traditionally left to the school board to decide. Here, the Pasadena diversity policy is a reflection of the educational judgment of the board and its professional educators that first-hand diversity is an important part of the overall educational process. Courts have historically refrained from interfering with the day-to-day educational decisions and policies of locally elected or appointed officials. This court should recognize and defer to the educational objectives of PUSD.

Courts sometimes go astray in concluding that the Constitution forbids any consideration of race unless there is a legally documented history of discrimination and the consideration is motivated by a desire to make up for past wrongdoings.

Courts also often misfire when discussing the issue of private choice. Some mistakenly conclude that since families choose where to live and districts draw attendance boundaries to create "neighborhood schools", districts must simply live with the results of racially identifiable housing patterns. To submit to that philosophy is to ignore the larger mission of public schools to provide the best education for children, regardless of whether society follows a similarly altruistic path. That social compact makes school officials beholden to act in the best interest of the children. In an increasingly diverse society it would be folly to ignore racial isolation and not affirmatively alter the pattern.

If school officials sit idly by and assign students strictly on the basis of neighborhood, the results are as predictable as they will be swift. Schools that were desegregated under an earlier era will be re-segregated and the opportunity for diversity in other instances will be lost.

School leaders in the Ninth Circuit, like those across the country, need confirmation that they may proceed with confidence in pursuing their mission in creating a diverse learning environment.

ARGUMENT

I. AN IMPORTANT PART OF THE PUBLIC SCHOOLS' MISSION IS TO PREPARE STUDENTS TO BE FULL PARTICIPANTS IN OUR NATION'S DEMOCRACY AND GLOBAL COMMUNITY.

As stated by the U.S. Supreme Court, an education "is required in the performance of our most basic public responsibilities. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values." *Brown v. Topeka Board of Education,* 347 U.S. 483, 493 (1954). It is a principal role of the public schools to prepare our children to participate in our democracy. This Court should protect the need for using race in light of the public schools' unique mission of preparing students for effective future citizenship.

The Pasadena Unified School District was not doing anything extraordinary when officials acknowledged the need for racially diverse classrooms and sought to ensure that important educational condition through policy. The public school curriculum goes beyond the traditional academic goals of reading, writing, and arithmetic. Our communities depend upon the leaders of K-12 schools to do much more to fully accomplish their mission.[2] A complete education is holistic, addressing the child's development in social skills, workplace skills and critical thinking and nurturing a child's ability to grow in all respects. This development, and the process of preparing students to live and work in an increasingly multicultural nation, is critically aided by racially diverse school settings.

To respond to changing times and the changing demands of success, schools have adapted their methodologies and content over the years. What might have seemed unusual or encountered resistance at the outset (*e.g.* physical education, art, music, sex education, breakfast, after-school programs) has gradually become the norm as local educators in each district recognize the wisdom of incorporating these elements into their educational program as the minimum necessary to prepare students for the future. The same is true of a racially diverse learning environment.

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[2] "The quality of education is reflected not only in the subjects taught and achievement levels reached but also in the learning environment of schools. … A school's learning environment is enhanced by … diversity in the backgrounds of the student body." U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1998*, at 130.

Census data confirm that the fabric of the U.S. population in this century will be woven from racially diverse strands.[3] For example, the student-aged Latino population has grown rapidly in the last 30 years, increasing by 218 percent from 1968 until today. Projections show that by 2050, more than one quarter of all school-aged children will be the children of immigrants. The Caucasian population will drop from 73 percent in 1997 to approximately 53 percent in 2050.[4]

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[3] In addition to the single-race children traditionally referred to and counted by the government, there are an increasing number of children of dual or multiracial heritage due to a rise in interracial couples. Recognizing this population shift, the 2000 Census form permitted individuals to select from all racial categories that apply.

[4] U.S. Census Bureau, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050*, *reprinted in* U.S. Department of Commerce, Minority Business Development Agency, "The Emerging Minority Marketplace" (1999).

Educators are faced with the challenge of preparing students to competently interact with others in the new social, political, and economic contexts that are emerging.[5] Our public schools recognize this and are adapting their academic and policy decisions accordingly. To do otherwise would be to shirk their responsibility and to fail in their mission to prepare children for the future.

II. THIS COURT SHOULD MODIFY TRADITIONAL STRICT SCRUTINY ANALYSIS IN CONSIDERATION OF THE EDUCATIONAL PURPOSES.

Courts have long recognized the special context of public schools and the related need for a different civil rights framework within the K-12 setting.[6] Special constitutional rules have been applied in the public K-12 setting under the First

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[5] *See* Jenny Oliver and Craig Howley, *Charting New Maps: Multicultural Education in Rural Schools*, ERIC DIGEST (1992).

[6] In *Tinker v. Des Moines Indp. Sch. Dist.*, 393 U.S. 503, 506 (1969), the Court found that students "do not shed their rights at the school house gate." But those constitutional rights must be interpreted "in light of the special characteristics of the school environment." *See also Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), (declaring that the rights of students "are not automatically coextensive with the rights of adults in other settings"); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (finding that, in light of the special context and pedagogical concerns of the school environment, school administrators have greater latitude than government generally to limit the First Amendment free press rights of K-12 student newspapers).

Amendment[7], the Fourth Amendment,[8] the Fifth Amendment,[9] the Eighth Amendment,[10] the Thirteenth Amendment[11] and the Equal Protection Clause.[12] In these cases the courts have found that constitutional rights within the K-12 context must be interpreted in such a manner that the underlying purpose of education is not diminished. The principle is equally applied here. The U.S. Supreme Court's equal protection analysis can be interpreted to respect the underlying mission of the public schools.

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[7] *Tinker* at 506 (1969); *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) ("First Amendment rights accorded to students must be construed in light of the special characteristics of the school environment.").

[8] *E.g., New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("It is evident that the school setting requires some easing of the [Fourth Amendment] restrictions to which searches by public authorities are ordinarily subject.") .

[9] *See Goss v. Lopez*, 419 U.S. 565 (1975) (applying the due process clause); *Bills v. Homer Consolidated Sch. Dist. No. 33-C*, 967 F.Supp. 1063 (N.D. Ill. 1997) (applying the self-incrimination clause).

[10] *Ingraham v. Wright*, 430 U.S. 651 (1977) (refusing to apply the Eighth Amendment prohibition against cruel and unusual punishment to corporal punishment in the K-12 setting).

[11] *Herndon v. Chapel Hill-Carboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (rebuffing a claim that a high school graduation requirement for students to perform fifty hours of community service violates the Thirteenth Amendment ban on involuntary servitude). *See also United States v. Kozminski*, 487 U.S. 931 (1988); and *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 998, 1000 (3d Cir.), *cert. denied*, 510 U.S. 824 (1993).

[12] *Plyler v. Doe*, 457 U.S. 202 (1982) (Supreme Court struck as unconstitutional the Texas statute which excluded children of illegal aliens from tuition free public schools). *See also Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988) (Supreme Court upheld transportation fee for reorganized school districts). In both cases the Court applied intermediate scrutiny; finding unconstitutional the state's

Constitutional rules do not exist in a vacuum. The need for enforcement of individual rights is always balanced against the asserted state interest. This court must consider the unique role of public schools in its analysis. Once considered one cannot help but conclude that a racially diverse learning environment is so necessary to the state's important educational goals that educators may take intentional steps to provide a diverse learning environment.

Courts have addressed the state's use of race as decision-making factors in other settings:

- *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (affirmative action in government contracting)
- *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989)(affirmative action in government contracting)

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denial of this especially important benefit unless the policy furthered some substantial government interest.

- *Hopwood v. State of Texas*, 78 F.3d 932, *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (affirmative action in a post-graduate professional degree program)

- *Johnson v. Board of Regents of the University System of Georgia*, No. 499CV169, (S.D. Ga. July 24, 2000) (affirmative action in university admissions)

These cases are not binding since they all occur outside the unique environment of K-12 education. The high standard of strict scrutiny applied in these cases should be balanced with the school's need to further its educational mission. This is consistent with the altered constitutional framework used by the courts in other constitutional questions.

Further, to characterize *Pasadena* as in line with the cases above is to fundamentally misunderstand the educational issue involved. The cases presented outside of the K-12 context focus on the state's attempt to remediate discrimination and to gain a representative sampling in contracting and higher education opportunities. *Pasadena* and other K-12 cases are motivated by the desire to ensure that every child benefits from the positive yield of a diverse learning environment. The outcome desired is not equity, access, or representation, but rather preparation for the rigors of economic interchange, the preservation of a fragile democracy built on harmony and unity, and equipping our future citizens –

through first-hand exposure – with the tolerance skills needed to negotiate an increasingly diverse world. The idea is not to confer a tangible benefit on one group, but to confer an intangible (but no less essential) benefit on all groups.

Far from being affirmative action – which typically seeks to remedy past discrimination – this might be termed affirmative proaction. Thus, it is incumbent upon board members to affirmatively and proactively ensure optimal learning conditions, which include such things as a well-constructed school, highly qualified teachers, vibrant and interactive learning opportunities and a racially diverse population. Placing young people in an environment where they work, play, compete and cooperate together imbues them with fundamental understanding and lasting characteristics that will serve them in the future working world and in virtually every aspect of their adult lives. The winner in this scenario is each and every child, the communities in which they live, society at large, and the democratic principles that are advanced.

III. ACHIEVING A RACIALLY DIVERSE LEARNING ENVIRONMENT IS AN IMPORTANT EDUCATIONAL OBJECTIVE THAT IS WITHIN THE DISCRETION OF LOCAL SCHOOL BOARDS.

If this court rules on the constitutionality of the policy, it should recognize a local school board's discretion to seek both student diversity and to avoid racial isolation as part of overall educational goals. The underpinning of a diversity policy is the educational good it will accomplish. Therefore, officials purposefully seek to achieve the many practical benefits gained by a diverse environment.

State laws and federal and state courts have long given local boards of education the authority to establish policies governing curriculum, programs offered, school location, and student assignment. In this case, school officials implemented a policy that permitted them to seek diversity based upon their educational expertise and judgment. Courts intercede in such educational policymaking only when there is a clear constitutional need.[13] Here, there are clear and compelling educational reasons for PUSD to seek racial diversity in a magnet school learning environment. This court should respect those academic decisions of the local school board.[14]

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[13]

- "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968).
- "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Goss v. Lopez,* 419 U.S. 565, 578 (1975).
- "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley,* 458 U.S. 176, 208 (1982); *Wood v. Strickland,* 420 U.S. 308, 326 (1975).

Because student assignment policies, such as BP 0460, are not racial classifications that seek a winner among competing, aspiring beneficiaries, cases outside the context of K-12 are not applicable (*See* II supra). In these circumstances, no student has been denied the benefit of a public education. *Amicus* believes that strict scrutiny is not appropriate. Yet, at any level of constitutional review, the compelling reasons for ensuring diversity by means of a narrowly tailored policy such as BP 0460 should prevail.

In fact on two recent occasions, U.S. courts of appeals have approved diversity programs under a strict scrutiny analysis. In *Hunter v. Regents of the University of California*, 190 F.3d 1061 (9th Cir. 1999) , *petition for rehearing pending*, this court found a compelling need to consider race when deciding admission to a public elementary school overseen by the University of California.

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[14] "School authorities have wide discretion in formulating school policy. ... As a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *Swann v. Charlotte Mecklenburg Bd. of Educ.*, 402 U.S. 1, 17 (1971).

This court furthermore found that the policy – which sought to compile research information from a laboratory school in order to help the state of California meet the needs of a changing public school population – was a narrowly tailored means of achieving that state interest. That case stands as binding precedent. As in *Hunter*, the case at bar involves a specialized public school setting. Similar to *Hunter*, school officials sought to create a diverse learning environment for children within that special setting.

In *Brewer v. West Irondequoit Central School District*, 212 F.3d 738 (2nd Cir. 2000), the U.S. Court of Appeals for the Second Circuit found favor in an inter-district transfer program that relied fully upon race. The policy, a longstanding attempt to achieve racial balance, allowed only black children to leave the city of Rochester, N.Y. for a suburban school district and permitted only white children to transfer into Rochester. The Second Circuit found the policy to have a compelling state interest and to be narrowly tailored. In PUSD's case, the policy is far more narrowly tailored. The Pasadena school board only would have considered the race of students when the overall applicant pool was so homogenous that the schools in question would have been in danger of becoming segregated, a circumstance that was never present and thus never required the policy to be invoked.

IV. RACE-SENSITIVE POLICIES ARE NECESSARY TO FURTHER THE IMPORTANT STATE INTEREST OF CREATING DIVERSE LEARNING ENVIRONMENTS.

Given the mythic status of the *Brown v. Board of Education*, jurists are accustomed to thinking of race and school districts within the paradigm of desegregation. That results in a limited view of the Constitution, and the belief that weighing race in student assignment is only permissible when done to remedy past discrimination and pursuant to a court order or government consent decree.

In 21st century America, that cannot be the case. While remedy and recompense may remain necessary in locales where the vestiges of segregation still ravage, there is a forward-looking rationale that is not dependent on a history of segregation. Diversity, standing alone, is a value that has merit apart from any other benefit.

For educators, the need for diversity is grounded in the very practical reality supported by scholarly research that academic performance and student achievement rise in a diverse learning environment. Furthermore, today's children will need to understand, tolerate and be able to negotiate among diverse people to be successful adults in a future world. Census figures show an increasingly diverse population and economic expansion foreshadows a financially interdependent global community. Among the positive effects of educational diversity are:

1. Increases Academic Achievement

Diversity spurs academic achievement for all students.[15] Among the positive educational benefits of diversity is an increase in college graduation, income, and employment patterns for minority children.[16] Studies have found, *inter alia*, that students who were educated in a diverse learning environment were more likely to attend and graduate from college and to work in professional positions than students who were not.[17]

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[15] "It is important to note that, in addition to positive effects on intergroup relations, cooperative-learning methods have had positive effects on students of different ethnicities and backgrounds." Robert E. Slavin, *Cooperative Learning and Intergroup Relations*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION, 628, 632 (James A. Banks, ed., 1995).

[16] Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, HANDBOOK ON RESEARCH ON MULTICULTURAL EDUCATION (James A. Banks, ed., 1995); *see also* Robert L. Crain and Rita E. Mahard, *Minority Achievement: Policy Implications of Research*, EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY (Willis D. Hawley, ed., 1981).

2. Improves Future Workforce

Diversity serves the interests of employers.[18] Research indicates that students who had a diverse school experience are better prepared for public service occupations such as teaching and police work, where they are called on to serve a diverse citizenry.[19] Business executives have found that integrated workplaces are more productive, enhance organizational flexibility and lead to an expansion of markets. General Motors in July submitted a brief in a University of Michigan admission case explaining the importance of a racially diverse student body in higher education and citing diversity as a necessity to the continued viability and strength of the workforce.[20]

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[17] James M. McPartland and Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation*, EFFECTIVE SCHOOL DESEGREGATION (Willis D. Hawley, ed., 1981). *See also* Robert L. Crain and Jack Strauss, DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT, (1985); and *The Role of Social Science in School Desegregation Efforts: The St. Louis Example*, 66 JOURNAL OF NEGRO EDUCATION 195 (1997).

[18] "Diverse teams that actually utilized the variety of perspectives present outperformed the homogeneous teams… Thus the major implication for managers from the current study is that whereas increasing diversity in work teams is inevitable due to demographic trends, there are also potential competitive advantages to be gained through tangible effects on team performance." Poppy Lauretta McLeod, Sharon Alisa Lobel, Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, SMALL GROUP RESEARCH, Vol. 27, No. 2, May 1996, at 248, 260-261. Based on research involving a brainstorming task in which participants were separated into an ethnically diverse group (black, Asian, Hispanic, white) and an all-anglo group and asked to develop ideas and engage in problem-solving).

Research also has shown that a diverse educational environment provides long-term career advantages. For example, it leads to reduced racial stereotyping, diminished fears of hostile interactions, and better acceptance of racially mixed occupational settings among both African Americans and Whites.[21]

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[19] *Compelling Interest: Examining the Evidence of Racial Dynamics in Higher Education, A Report of the AERA Panel on Racial Dynamics in Colleges and Universities* (Mitchell Chang, *et al.*, eds., 1999).

[20] *See Grutter v. Bollinger*, No. 97-CV-75928-DT (E.D. Mich.), G.M. states in its brief in the case: "In General Motors' view, only a well-educated, highly-diverse workforce, comprised of people who have learned to work productively and creatively with individuals from a multitude of races and ethnic, religious, and cultural histories can maintain America's global competitiveness in the increasingly diverse and interconnected world economy."

[21] W.T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31(2) INT'L JOURNAL OF CONTEMPORARY SOCIOLOGY 273 (1994); and Janet W.

One researcher concluded that a lack of diversity is "harmful because most minority-group members must find their ways into desegregated institutions if they are to achieve success as adults."[22] Diversity is a necessary step to ensure equality because those students who have not been exposed to diversity are ill equipped to cope with it in higher education and in the workplace.[23]

3. Promotes Tolerance

In a diverse learning environment, students nurture skills vital to student success as productive, effective citizens in a 21st century world. On the occasion of the 45th anniversary of *Brown v. Board of Education*, Richard Riley, Secretary, U.S. Department of Education, spoke of the significant impact of diversity in public schools.

> "Since *Brown* there has been a wealth of new evidence confirming the important role schools play in the healthy development of children.

Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK ON RESEARCH ON MULTICULTURAL EDUCATION (James A. Banks, ed., 1995).

[22] J. Braddock, R. Crain and J. McPartland, *A Long Term View of School Desegregation: Some Recent Studies of Graduates As Adults*, Phi Delta Kappan, (December 1984).

[23] Id. at 263.

> It is our schools that must reaffirm – both by lesson and by example – the moral correctness of equality. … We need to focus on issues that go beyond basic challenges to equality and involve more complex questions of perception and trust, which go to the very heart of how we live, work and interact with each other."[24]

Following an extensive study of race relations in several high schools, William Brown and Martin Patchen documented several examples of improvements in relationships between people of different races following integration.[25] For example, they concluded that, in general, as the proportion of classmates of other races increased, students had "more friendly interracial contact".[26]

In addition, shared activities, particularly those in which students cooperate toward common goals, promoted the development of "friendly" interracial relationships.[27] Brown and Patchen found that, in turn, these friendly contacts led to the development of more positive perceptions of people of other races.

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[24] U.S. Department of Education Secretary Richard Riley on the occasion of the 45th Anniversary of *Brown v. Board of Education*, May 17, 1999.

[25] William R. Brown and Martin Patchen, *Assessing Measures of Contact Theory*, ERIC Database (1982).

[26] Id. at 162.

Research on the impact of diversity has found that it is better educationally for school districts to take intentional steps to foster exposure to children of all races, ethnicities and nationalities. These efforts send a strong message to children:

> "[T]he fact is that social learning occurs whether it is planned or not. Hence, an interracial school cannot choose to have no effect on intergroup relations. It can only choose whether the effect will be planned or unplanned. Even a *laissez-faire* policy concerning group relations conveys a message – the message that either school authorities see no serious problem with relations as they have developed or they do not feel that the nature of intergroup relations is a legitimate concern for an educational institution."[28]

Social scientist Wade Smith wrote that "[t]olerance evolves, like culture or language. Our regard for others is rarely immutable; and it often depends as much on the milieu in which our attitudes develop, as on the particular outgroup in question."[29] In a 1997 study, Jennifer Hochschild took this principle a step further and found that "[r]acial separatism is neither … a viable option for most African Americans nor an attractive one for most whites. At best, it is unstable and personally constricting; at worst, it is a recipe for increased tension, hatred, and eventual violence."[30]

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[27] Id. at 231.

[28] Janet Ward Schofield and H. Andrew Sagar, *Desegregation, School Practices and Student Race Relations*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 59 (Christine H. Rossell et al. eds., Temple University Press,1983); *see also* Amy S. Wellans and Robert Crain, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS (1998).

Because of ongoing racial isolation in social settings and residential housing, schools often offer children their first experience in a diverse society and must ensure the setting in which to provide this.[31] Distilled to its essence, schools teach students the life interaction skills they need to succeed, and diverse settings are necessary to impart these skills effectively.

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[29] *Cohorts, Education, and the Evolution of Tolerance*, 14 SOCIAL SCIENCE RESEARCH 205, 205-225 (1985).

[30] Jennifer Hochschild, *Is School Desegregation Still a Viable Policy Option?*, POLITICAL SCIENCE & POLITICS (1997).

[31] Janet Ward Schofield, *et al.*, *The Evolution of Peer Relations in a Desegregated Middle School*, ERIC DATABASE (1979).

V. DEFERRING TO PRIVATE DECISIONMAKING IGNORES THE MEANINGFUL AND HISTORIC MISSION OF PUBLIC SCHOOLS TO SERVE SOCIETY AND OUR DEMOCRACY.

A common argument that is advanced to defend racial isolation is one of the free market. Proponents contend that people choose where to live and that schools assign students based on geography, providing "neighborhood schools".

The district court in this case invoked *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979), *Eisenberg v. Montgomery County Public Schools*, 197 F.2d 123, 132 (4th Cir. 1999) and *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) for the principle of private decisionmaking.[32] The *Spangler* court observed that "[t]he Supreme Court… emphasized that when a large percentage of minority students results from housing patterns for which school authorities are not responsible, the school board may not be charged with unconstitutional discrimination if a racially neutral assignment method is adopted."[33] The court below observed that racial imbalance sometimes is "a product of private choices [and] it does not have constitutional implications." Yet these cases stand only for the proposition that the Constitution does not require school districts to address segregation that is solely "a product of private choices." Here, plaintiffs' burden is to show that the Constitution prohibits a school district from voluntarily addressing such segregation.

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[32] *Scott v. Pasadena Unified School District*, No. 99-1328 DT, slip op. at 19-20 (C.D. Calif. Feb. 8, 2000).

[33] Id. at 19.

VI. RACE-SENSITIVE POLICIES ARE NECESSARY; WITHOUT THEM RE-SEGREGATION OF PUBLIC SCHOOLS IS LIKELY TO OCCUR.

If educators are forbidden to take intentional steps to ensure diversity, it is likely that the schools will quickly recede into segregated patterns.[34] Already without the diligence of desegregation efforts our public schools are becoming more segregated than integrated.[35] Even though the percent of minority students has increased by 6.2 percent from 1986-1996, racial isolation has increased by 5.5 percent during the same time period.[36] In fact in the western states[37] 69.7 percent of black public school students were enrolled in racially identifiable schools in 1992; by 1996 that rate had increased to 73.5 percent.[38]

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[34] A good example of what happens when school officials exclude diversity or racial isolation from deliberations is Lowell High School, a coveted magnet school in San Francisco, California. Under the new admissions policy – which may take special account of the applicant's economic background but not his or her race – the number of African-American eighth graders accepted dropped from 5.6 percent to 2 percent; and the percentage of Latino students fell from 11.4 percent to 5.4 percent. Peter Schrag, *The Diversity Defense*, THE AMERICAN PROSPECT, September 1, 1999 at 57.

[35] G. Orfield, M. Bachmeier, D.R. James and T. Title, *Deepening Segregation in American Public Schools: A Special report from the Harvard Project on School Desegregation*, ERIC DIGEST (1997); G. Orfield, & John T.Yun, *Resegregation in American Schools*, THE CIVIL RIGHTS PROJECT, Harvard University (1999).

Specific to California, there has been a 2.7 percent increase in segregation from 1980 to 1996.[39] This places California as second in black and latino segregation in public schools: "it is apparent that California [has] moved into the top levels of black segregation in the country even though California has less than a tenth of black students."[40]

NOTE: Gary Orfield was named as a court-appointed expert in *Ho v. San Francisco NAACP*, 576 F. Supp. 34, 65 (N.D. Cal. 1983).

[36] U.S. Department of Education, National Center for Education Statistics, OERI, *The Condition of Education 1999* at Table 46-1; 47-1; 47-2.

[37] States included for this analysis are: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. U.S. Department of Education, National Center for Education Statistics, OERI, *The Condition of Education 1999, p. 252.*

[38] Id. at Table 27.

[39] Orfield at 21; U.S. Department of Education, National Center for Education Statistics, OERI, *The Condition of Education 1999*, p. 128-129.

Unfortunately, for most minority students this means they are exchanging "the resources of a middle class school for a poverty stricken one." [41] Scholars make the point that racially isolated minority schools must make do with less, coping with fewer resources than racially isolated white schools.[42] Racially isolated minority schools are also more likely to be educationally inferior.[43] With 80 percent of racially identifiable minority schools facing conditions of poverty as opposed to 5 percent of white schools, opportunities for minority students in desegregated schools will likely decline.[44] Similarly, white students will go back

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[40] Id. at 22.

[41] Jeanne Weiler, *Recent Changes in School Desegregation.* ERIC Digest (1998).

[42] Carol Ascher, *The Changing Face of Racial Isolation and Desegregation*, ERIC CLEARINGHOUSE ON URBAN EDUCATION, New York, NY (1993).

[43] "Something systemic about a school serving predominantly black, or predominantly white, students – covering both resources and expectations – contributes to the success or failure of all students who attend. These inequities are one reason why resource and school effectiveness issues have joined racial balance as aspects of desegregation politics." Id.

[44] G. Orfield, M. Bachmeier, D.R. James and T. Title, *Deepening Segregation in American Public School: A Special Report from the Harvard Project on School Desegregation*, ERIC Digest (1997).

to segregated environments. While that situation is not typically plagued by poverty, it lacks the important benefits of diversity.

Today, many districts are being released from court-ordered desegregation plans. If these districts are forced to cease proactive efforts at maintaining diversity, their previous efforts will have been fruitless. As stated by the noted jurist, David Tatel: "It is also possible that it is too late …if [we are] preparing to end this nation's historic effort to desegregate its schools before the task is complete. [This] would be a tragedy. As we move toward the twenty-first century and our nation becomes increasingly diverse, the argument for integrated schools becomes more, not less, compelling."[45]

Segregated schools lead to further segregation in society.[46] If unchecked, the misunderstandings and divisions caused by segregation will continue to devolve to unthinkable degrees. [47] First-hand experience, as conceived in the historic mission of public schools, will help wipe away suspicion, distrust and apprehension and replace it with tolerance, if not understanding.

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[45] David S. Tatel, *Desegregation Versus School Reform: Resolving the Conflict*, 4 STAN. L. & POL'Y REV.61, 68 (1993).

[46] J. Braddock, R. Crain and J. McPartland, *A Long Term View of School Desegregation: Some Recent Studies of Graduates As Adults*, Phi Delta Kappan, (December 1984)

Diversity in K-12 schools promotes citizenship and harmony among people of different backgrounds and experiences, an ideal that has been a continuing challenge since the Declaration of Independence – and without which the United States cannot continue to succeed as a democracy.[48] At best, the formative schooling years are a time when the many peoples of the United States come

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[47] An example of this is in Iowa, where agriculture-related jobs are attracting a more racially and ethnically diverse population to rural areas, prompting "white flight." Tom Andersen, a consultant for the Iowa Department of Education said "These families aren't used to being in the minority, and there is a tendency when they start feeling uncomfortable to leave. People might not talk about it, but all you have to do is look at the facts." Colleen Krantz, *'White Flight' Burdens Rural Schools*, THE DES MOINES REGISTER, July 27, 2000; Available in WESTLAW, 2000 WL 4968181.

[48] *Ambach v. Norwich*, 441 U.S. 68, 76 (1979)(Discussing the "singular importance" of public elementary and secondary schools "in preparation of individuals as citizens and in the preservation of values on which our society rests").

together to learn that our commonalities outweigh our differences and that our destinies are intertwined.[49]

CONCLUSION

It would indeed be ironic if proactive efforts to achieve magnet school diversity were denied by the courts. Magnet schools are an appropriate focus for diversity since their origin stems from this purpose.[50] The development of magnet schools grew out of the need to desegregate public schools.[51] They were designed as dynamic learning places – attributes that attract children from nearly all parts of a school district that might be racially diverse as a whole, but segregated by neighborhood. Hence, the name: magnet school. That objective remains true today.[52]

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[49] *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 681 ("[one] of the objectives of public education is the inculcation of fundamental values necessary to the maintenance of a democratic political system.").

[50] Indeed, the need for diversity expressed by PUSD is aligned with federal priorities expressed in the Magnet Schools Assistance Act, 20 U.S.C. §7201. "[I]t is in the best interest of the Federal Government to … continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education."

[51] The first magnet school that sought to reduce racial isolation opened in Tacoma, Washington in 1968, followed by one in Boston Massachusetts in 1969, although neither were referred to by that name. From there the growth was exponential, and by the 1980s, most major cities had magnet schools.

NSBA urges this court to abide by the original teachings of *Brown v. Board of Education*, 347 U.S. 483 (1954). Now, even more than 45 years ago, we understand that "separate … [is] inherently unequal."[53] In the U.S. today, it is not just that "separate is inherently unequal"; but separate is academically deficient.

Respectfully Submitted,

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[52] A state appeals court in New Jersey in July directed the commissioner of education to help secure financing for a proposed university-affiliated magnet school, a move related to a 1998 court order requiring Englewood to make one of its high schools more racially diverse. *Board of Educ. of Borough of Englewood Cliffs, Bergen County v. Board of Educ. of City of Englewood*, Available in WESTLAW, 2000 WL 1006089 (N.J.Super.A.D.).

[53] *Brown v. Board of Education*, 347 U.S. at 495 (1954).

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CERTIFICATE OF COMPLIANCE

Scott v. Pasadena Unified School District

This NSBA *amicus curiae* brief has been prepared using Microsoft Word 97, Times New Roman, 14 point.

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Aug 3, 2000
Date

Julie K. Underwood

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2000, true and correct copies of the foregoing NSBA *amicus curiae* brief in support of Pasadena Unified School District were deposited in the United States mail, first class postage pre-paid, addressed to the following:

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COUNTY OF ORANGE

DONALD BRUCE CRAWFORD,

Plaintiff and Petitioner,

vs.

HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT, a political subdivision of the State of California; CALIFORNIA DEPARTMENT OF EDUCATION; and B. TIMOTHY GAGE, in his official capacity as the State Director of Finance,

Respondents and Defendants.

CASE NO. 814334

[PROPOSED] MEMORANDUM OF POINTS AND AUTHORITIES OF *AMICUS CURIAE* THE EDUCATIONAL LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT HUNTINGTON BEACH UNION HIGH SCHOOL DISTRICT

Filed Concurrently Herewith:
Notice of Application and Hearing; Application; [Proposed] Order; Declaration of Henry H. Gonzalez; Appendix of Non-California Authorities

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Pipes and Volokh, "Women Need Not Fear The Civil Rights Initiative; CCRI: Its Language Strengthens Rather Than Weakens Laws Against Sex Discrimination" L.A. Times (January 24, 1996) 7

Schofield, "Review of Research on School Desegregation's Impact on Elementary and Secondary School Students" Handbook of Research and Multicultural Education (Banks ed., 1995) 10

The Educational Legal Alliance of the California School Boards Association ("CSBA"), appearing as *amicus curiae*, respectfully submits this memorandum of points and authorities in support of the motion for summary judgment filed by Defendant Huntington Beach Union High School District ("HBUHSD") to deny the petition for writ of mandate.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented here go well beyond the facts and parties in this case. Petitioner Donald Bruce Crawford ("Petitioner"), with the help of the Pacific Legal Foundation, seeks to invalidate a state education statute which ensures integrated, nonsegregated schools. California's open enrollment law, Education Code section 35160.5, grants local school districts the authority – consistent with their obligations under state and federal law – to consider the race of students in granting school transfers. Section 35160.5 was enacted to ensure that parental choice under a school district's open enrollment policy does not result in or exacerbate racial segregation in schools.[1] Petitioner is challenging not just this law but also HBUHSD's open enrollment policy, which was adopted pursuant to Education Code section 35160.5. Petitioner asserts that each, *on its face*, violates Article 1, Section 31 of the California Constitution ("Proposition 209").

This broad facial challenge lacks merit, however, because no showing can be made that section 35160.5 or HBUHSD's policy fatally conflict with Proposition 209, or any other constitutional provision. Proposition 209 does not, and was not intended to, prohibit school desegregation measures such as race-conscious student transfer policies, adopted pursuant to voluntary integration plans.[2] Even if Proposition 209 were to apply to race-conscious school desegregation measures, no violation of Proposition 209 would exist here because neither section 35160.5 nor HBUHSD's policy grant a preference or discriminate on the basis of race.

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[1] Education Code section 35160.5 provides in relevant part:

> On or before July 1, 1994, the governing board of each school district shall, as a condition for the receipt of school apportionments from the state school fund, adopt rules and regulations establishing a policy of open enrollment within the district for residents of the district . . . . [which] shall provide [among other things] that the parents or guardian of each school age child who is a resident in the district may select the schools the child shall attend, irrespective of the particular locations of his or her residence within the district, except that *school districts shall retain the authority to maintain appropriate racial and ethnic balances among their respective schools at the school districts' discretion or as specified in applicable court-ordered or voluntary desegregation plans.*"

Cal. Educ. Code § 35160.5(b) (emphasis added).

The challenged statute and policy simply ensure that all students receive an equal and integrated education. No student is granted or denied any concrete educational benefit or advantage because of race Indeed, it is uncontested that HBUHSD offers the same educational programs at each of its five comprehensive high schools and allows all students to compete on equal footing without regard to race for admission to the district's three magnet programs. Because no preferences or discrimination are created on the face of the open enrollment law or HBUHSD's policy, Proposition 209 is inapplicable.

Yet, Petitioner asserts, without any legal or factual basis, that Proposition 209 was intended to, and does in fact, prohibit nonpreferential school desegregation programs that contain race-conscious student assignment policies. In truth, the very text of Proposition 209, its related ballot materials, and California and federal case law interpreting the initiative all confirm that Proposition 209 bans *only* race-conscious state action that is preferential and discriminatory, nothing else. Contrary to Petitioner's assertion, Proposition 209 was never intended to prohibit nonpreferential state action. In upholding the constitutionality of this initiative, the Ninth Circuit specifically recognized that race-conscious desegregation measures are not impermissible preferences, strongly suggesting that such measures are beyond the reach of Proposition 209.

The conclusion that Proposition 209 permits race-conscious school desegregation measures is also consistent with relevant federal and state case law. Under established equal protection law, state action that merely ensures equal treatment without granting or denying anyone concrete benefits does not violate the Fourteenth Amendment. Further, the United States Supreme Court has specifically recognized the broad powers of local school officials to formulate educational policy in the school desegregation area. Not surprisingly, courts have consistently upheld race-conscious school assignment policies that are not preferential or discriminatory.

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[2] Petitioner is not challenging race-conscious student assignment policies adopted pursuant to court order, as permitted under Education Code section 35160.5. Indeed, Proposition 209 expressly exempts such state action: "Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section." Cal. Const. Art. 1, § 31(d).

Likewise, the California Constitution has expressly sanctioned voluntary school desegregation programs for years. In amending the state's Equal Protection Clause in 1979 through a voter initiative, the people of California explicitly approved of the power of local school districts to adopt voluntary integration programs and made clear that such race-conscious programs do not violate the state's equal protection clause. *See* Cal. Const. Art. 1, § 7. The California Supreme Court also has long held that school districts have an affirmative obligation under the state's equal protection clause to prevent and remedy racial segregation in schools, whatever its cause. *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 955. There is no question that voluntary school desegregation measures, including race-conscious student assignments, are clearly permitted and guaranteed under the California Constitution.

The fact that racial segregation in schools may be the result of parental choice under an open enrollment policy does not relieve the state or local school districts of their constitutional duties. Indeed, courts have found school districts liable for de jure segregation in violation of the federal equal protection clause where there is evidence that local school boards ignored their state law obligations to remedy de facto segregation. A finding that Proposition 209 prohibits voluntary desegregation programs would not only render the open enrollment statute unconstitutional but also expose local school districts to liability under state and federal law. *See id.* at 953 ("so far as the [statute] preserves even de facto segregation, by affording governmental support to such segregation, it casts the state itself in the unhappy role of the savior of de-jure segregation, and fails constitutionally").

In short, Petitioner's far-reaching interpretation of Proposition 209 must be flatly rejected. The Court should uphold the authority and discretion of school districts throughout this state to adopt nonpreferential, race-conscious integration measures whose purpose is to prevent and/or remedy racial segregation in schools, as permitted and required by both the state and federal Constitutions. To hold otherwise would violate the plain language of the initiative, contravene applicable state and federal case law, create an impermissible conflict between two provisions in the California Constitution, and subject school districts throughout California to liability under state and federal law. This cannot be what the voters of the State of California intended.

II. ARGUMENT

CALIFORNIA'S OPEN ENROLLMENT LAW, EDUCATION CODE SECTION 35160.5, AND HBUHSD'S APPLICATION OF THIS LAW ARE CONSISTENT WITH PROPOSITION 209.

In determining the validity under Proposition 209 of Education Code § 35160.5 and HBUHSD's open enrollment policy, the Court must determine whether on their face each inevitably results in preferential treatment or discrimination. Contrary to Petitioner's assertions, however, neither § 35160.5 nor HBUHSD's policy create racial preferences or discrimination. Rather, both the statute and HBUHSD's policy seek: (1) to secure equal educational opportunities, not preferences, for minority students; (2) to maintain an integrated educational environment for all; and (3) to ensure California's open enrollment law does not result in racially isolated and segregated schools, in violation of the California and United States Constitutions. There is no question that under applicable law, these goals serve important and compelling state interests and do not offend the state or federal constitutions.

A. Petitioner's Facial Challenge Fails Because No Showing Has Been Or Can Be Made That Education Code Section 35160.5 And HBUHSD's Open Enrollment Policy Are Unconstitutional In *All* Of Their Applications.

In an action seeking to invalidate a state law, the Court must presume the constitutionality of the challenged law. *See County Mobilehome Positive Action Comm., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727, 733. A party seeking to have a law declared unconstitutional bears "the burden of 'surmounting all possible intendments, presumptions and reasonable doubts indulged in favor of [its] validity'." Suter v. City of Lafayette (1997) 57 Cal.App.4th 1109, 1130 (citation omitted). It is not enough for the challenged law to pose a potential conflict with constitutional provisions in "some future hypothetical situation." *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180-181. Rather, there must be a showing that the challenged law "inevitably" poses a "total and fatal" conflict with a constitutional provision. *County Mobilehome*, 62 Cal.App.4th at 733. "The corollary to . . . [this heavy burden] is that if the court can conceive of a situation in which the . . . [law] can be applied without entailing an inevitable collision with constitutional provisions, the . . . [law] will prevail." _Id_ at 733 (quotations omitted). Petitioner therefore must show not merely that Education Code section 35160.5 and HBUHSD's open enrollment policy are susceptible of an unconstitutional construction, but that each is "incapable of *any* valid application." *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 121 (citations omitted) (emphasis in original). Petitioner is unable to make this showing.

Section 35160.5 merely provides that school districts have the authority – consistent with their state and federal obligations – "to maintain appropriate racial and ethnic balances" to ensure that open enrollment will not result in racial isolation and segregation in California schools. Cal. Educ. Code § 35160.5(b)(2)(A). Nowhere does Education Code section 35160.5 state or even suggest that a school district can deny or grant students educational benefits on the basis of race.

Nor has HBUHSD applied the statute in this way. Students are not assigned to a school by race; rather, students are assigned by residence. Students are permitted to transfer to a school of their choice unless their request exacerbates racial segregation in a particular school. Students are not forced to travel to a school beyond their residential neighborhood for integration purposes. Further, as HBUHSD's officials confirm, students receive the same educational opportunities at each of the district's five comprehensive high schools. Moreover, under HBUSHD policy, school officials are prohibited from using race in the selection of students for the district's three magnet programs. Under these circumstances, the denial of a student's transfer request clearly does not rise to the level of discrimination or preferential treatment under existing law. *See Associated General Contractors of California v. San Francisco Unified School Dist.* (9th Cir.) 616 F.2d 1381, 1387 (stating students have "no 'right' to attend a segregated school" and school desegregation programs generally provide "the same thing (e.g., education in an integrated school) to everyone" as well as "benefits . . . to the whites"), *cert. denied*, 449 U.S. 1061 (1980). In short, neither Education Code §35160.5 nor HBUHSD's open enrollment policy create preferences or discrimination in violation of Proposition 209.

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B. Because School Desegregation Programs Generally Do Not Grant Preferences Or Discriminate, They Are Not Prohibited By Proposition 209, Which Bars Only Preferential Treatment And Discrimination.

Petitioner's overly expansive interpretation of Proposition 209 as banning all forms of race-conscious state action conflicts with both the intent of California voters as well as established state and federal case law

1. The Text Of The Initiative, Relevant Campaign Materials, And Statements From The Sponsors Make Clear That Proposition 209 Does Not, And Was Not Intended To, Prohibit All Race-Conscious State Action.

The plain language of Proposition 209 and all relevant background materials confirm that Proposition 209 only bars – and was intended only to bar – preferential treatment and discrimination, and not all forms of race-conscious state action.[3]

Proposition 209 provides that, subject to certain enumerated exceptions, the government "shall not *discriminate* against, or grant *preferential* treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting." Cal. Const. Art. I, § 31(a) (emphasis added). Thus, on its face, Proposition 209 only prohibits "discrimination" and "preferential treatment," nothing more. Importantly, Proposition 209 does not prohibit the use of race to ensure equal opportunity where there is no discriminatory or preferential treatment or intent.

This plain reading of Proposition 209 is supported by its accompanying ballot pamphlet materials. For example, the legislative analysis of Proposition 209 states in relevant part: "This measure would eliminate state and local government action programs in the areas of public employment, public education, and public contracting to the extent these programs involve 'preferential treatment' based on race, sex, color, ethnicity, or national origin." California Ballot Pamphlet, General Election ("Ballot Materials"), November 5, 1996, attached as Ex. C to Stipulation for Purposes of Cross-Motions For Summary Judgment ("Stipulation") at 80. The rebuttal to arguments against Proposition 209 in the official ballot materials also concedes its limited scope, noting that "[a]ffirmative action programs that don't discriminate or grant preferential treatment will be UNCHANGED." *Id* at 83 (emphasis in original). In addition, then-Governor Wilson and Ward Connerly, the Chairman of the campaign to approve Proposition 209, assured voters in the ballot argument in favor of Proposition 209 that "Proposition 209 *keeps* in place *all* federal and state *protections* against discrimination" and "allows any program that does *not* discriminate, or prefer, because of race or sex to *continue*." *Id.* at 82 (emphasis added).

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[3] In divining the meaning of a ballot measure, courts look not only to the plain language of the measure but also to accompanying ballot materials and statements of the measure's sponsors. *See Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 740 fn. 14; *In re Lance W.* (1985) 37 Cal.3d 873, 888, fn. 18.

Moreover, Proposition 209's sponsors repeatedly provided assurances to voters during the course of the initiative's campaign that this measure *would not* prohibit race-conscious efforts to detect or eliminate discriminatory practices. Both before and after the vote, Ward Connerly publicly emphasized the continued viability of affirmative action programs that were not preferential or discriminatory.[4] Connerly's statements confirming the limited scope of Proposition 209 were echoed by a veritable chorus of initiative proponents.[5]

Thus, contrary to Petitioner's expansive reading, the undisputed record makes clear that the voters – including the initiative's own sponsors – never intended Proposition 209 would do away with existing constitutional protections against discrimination and unequal treatment. Therefore, the basic premise on which the present action is based is fundamentally flawed.[6]

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[4] *See, e.g.*, Connerly, "You, Me, and CCRI: A Letter to Collin Powell," The *Weekly Standard*, Aug. 19, 1996 ("[T]he claim that Proposition 209 will eliminate all affirmative action and outreach programs is, with all due respect, preposterous, and there is indisputable evidence to support my position. This measure will only eliminate those programs which discriminate . . . or grant . . . preferential treatment."), attached as Ex. A to Declaration of Henry H. Gonzales ("Gonzalez Decl."); Chavez, "Language Takes Central Role In Fight Over CCRI," *Sacramento Bee*, June 2, 1996 (quoting Connerly as saying at press conference that Proposition 209 "[i]s an attack on preferences"), attached as Ex. B to Gonzalez Decl.

[5] *See, e.g.*, Decker, "Affirmative Action: Why Battle Erupted," *L.A. Times*, Feb. 19, 1995 (stating Tom Wood, co-author of Proposition 209, "and some supporters believe that the measure would not ban any other diversity tools, such as . . . preparing minority high school students for university admissions"), attached as Ex. C to Gonzalez Decl.; Mendel, "Affirmative Action: Can Democrats Find Room For Compromise?," *S.D. Union Tribune*, Oct. 9, 1995 (stating that Darrell Issa, co-chair of campaign to adopt Proposition 209, "says he opposes 'quotas,' not outreach programs and other attempts to bring minorities into the mainstream"), attached as Ex. D to Gonzalez Decl.; Pipes and Volokh, "Women Need Not Fear The Civil Rights Initiative; CCRI: Its Language Strengthens Rather Than Weakens Laws Against Sex Discrimination," *L.A. Times*, Jan. 24, 1996 ("The CCRI would effectively prohibit [discrimination and preferences], while leaving intact outreach and other nonpreferential forms of affirmative action"), attached as Ex. E to Gonzalez Decl.

[6] Petitioner argues in his opening brief at page 7 that the legislative analysis supports his interpretation that Proposition 209 sought "racial neutrality in all governmental decision making with respect to public education." This simply is incorrect. The Legislative Analyst repeatedly states that only those "government affirmative action programs" that "involve 'preferential treatment'" would be eliminated.

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2. Court Decisions Interpreting Proposition 209 Hold That Proposition 209 Permits Nonpreferential And Nondiscriminatory Race-Conscious Government Action Such As School Desegregation Programs.

The California Court of Appeal and the Ninth Circuit already have assessed the proper scope of Proposition 209. *See, e.g.*, *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435; *Coalition for Economic Equity v. Wilson ("Wilson")* (9th Cir. 1997) 122 F.3d 692. Both have reached the same conclusion – namely, that Proposition 209 only bars preferential treatment and discrimination, not all race-conscious government action.

In *Lungren*, the Third Appellate District considered a pre-election challenge to Proposition 209 seeking to rename the measure to reflect that its chief purpose was to prohibit all affirmative action. 48 Cal. App. 4th at 437-443. The Court of Appeal determined that Proposition 209 did not ban all affirmative action, and therefore the ballot measure did not need to be retitled. *See id.* at 442. According to the court, the "only . . . conduct which Proposition 209 would ban . . . [is] discrimination and preferential treatment." *Id.*

The *Lungren* Court also compared the breadth of affirmative action measures with the specific conduct banned by Proposition 209. The court explained that, in contrast to "preferences" and "discrimination," "affirmative action" and other forms of race-conscious programs include a broad array of permissible governmental conduct that is:

> taken to provide equal opportunity . . . [or that is] "required by federal statutes and regulations . . . designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and *to create systems and procedures to prevent future discrimination*."

Lungren, 48 Cal. App. 4th at 442 (emphasis added).

Similarly, the Ninth Circuit, in upholding the constitutionality of Proposition 209, stated that "Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account" of one of the enumerated grounds in

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Nowhere does the analysis state or even suggest that nonpreferential desegregation programs could be eliminated by Proposition 209. In fact, the analysis makes clear that only those magnet programs "where race or ethnicity are *preferential* factors in the admission of students to the schools" could be eliminated. Ballot Materials, attached as Ex. C. to Stipulation at 81 (emphasis added).

the initiative. *Wilson*, *122* F.3d at 702 The *Wilson* Court made clear that no other state action is prohibited under Proposition 209:

> "[R]ace specific relief" is hardly synonymous with "preferential treatment on the basis of race." A state may "eradicate racial discrimination" in many ways that do not involve racial preferences.

Id. at 700 fn. 7. In fact, the Ninth Circuit in *Wilson* specifically pointed to school desegregation programs as an example of race-conscious conduct that does not involve preferences.

> The district court [in Wilson] perceived no relevant difference between the busing programs at issue in *Seattle* and the racial preference programs at issue here. We have recognized, however, that "stacked deck" programs [such as race-based "affirmative action"] trench on Fourteenth Amendment values in ways that "reshuffle" programs [such as school desegregation] do not." *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381, 1387 . . . . *Unlike racial preference programs*, school desegregation programs are not inherently invidious, do not work wholly to the benefit of certain members of one group and correspondingly to the harm of certain members of another group, and do not deprive citizens of rights.

Id. at 707 fn. 16 (emphasis added).[7]

By reaffirming the distinction between "racial preference programs" on the one hand and nonpreferential, nondiscriminatory school desegregation programs on the other, the Ninth Circuit in *Wilson* implicitly held that school desegregation programs are not prohibited by Proposition 209. Otherwise, as HBUHSD points out in its opening brief, the Ninth Circuit would have had no choice but to find Proposition 209, as applied to school desegregation programs, unconstitutional under *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457, 102 S.Ct. 3187. In *Seattle*, the United States Supreme Court held that a voter initiative which precluded a local school board from proceeding with its voluntary integration program violated the Fourteenth Amendment. The Ninth Circuit in *Wilson* distinguished *Seattle* as follows:

> By removing desegregative prerogatives from . . . general grants of power, the State [in *Seattle*] . . . [improperly] differentiated the treatment of racial problems in education from that afforded educational and racial issues generally. When, in

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[7] The Ninth Circuit in *Associated General*, 616 F.2d at 1386-1388, developed the concept of a "reshuffled deck" versus a "stacked deck" to illustrate when state action is preferential and discriminatory. Under this framework, racial preferences exist only if a program imposes a concrete detriment or "stacks the deck" in favor of members of a racial group. *Id.* at 1387. In contrast, "reshuffle" programs "neither give[] nor withhold[] from anyone any benefits because of that person's group status, but rather ensure[] that everyone in every group enjoy[] the same rights in the same place." *Id.* at 1386. Applying this framework, the Ninth Circuit in *Associated General* recognized that school desegregation programs were generally nonpreferential and nondiscriminatory. *Id.*

> contrast, a state prohibits all its instruments *from discriminating against or granting preferential treatment* to anyone on the basis of race . . . it has promulgated a law that addresses in neutral-fashion race-related . . . matters.

122 F.3d at 707 (emphasis added). Thus, to interpret Proposition 209 to prohibit nonpreferential and nondiscriminatory race-conscious desegregation measures would in effect "remove[] desegregative prerogatives" from the authority of local school districts thereby "differentiat[ing] the treatment of racial problems in education" from education issues generally. *See id.* Such a result clearly would violate the Fourteenth Amendment as interpreted by *Seattle* and render Proposition 209 unconstitutional.

Seattle, Wilson and Lungren all compel the conclusion that Proposition 209 bars only state action that is preferential and discriminatory while permitting nonpreferential school desegregation measures.[8]

3. Equal Protection Case Law Confirms That Race-Conscious State Action Taken To Ensure Equal Protection Under The Law Does Not Constitute "Preferential Treatment" Or "Discrimination."

Proposition 209 essentially mirrors federal and state equal protection guarantees, which prohibit only discriminatory and preferential state action. *See Wilson,* 122 F.3d at 708-709 (comparing Proposition 209 and federal Equal Protection Clause). Under well-established case law, heightened scrutiny for racial classifications is reserved only for state action that grants or denies a concrete benefit or opportunity on the basis of race. Contrary to Petitioner's assertions, heightened scrutiny does not apply to a statute or government program that invokes race without preferential or discriminatory treatment or intent.

For example, in *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 223, which examined race-based programs intended to favor minorities, the Supreme Court repeatedly stated that it reserved its heightened scrutiny for state action creating "any preference based on racial or ethnic criteria." *Id.* The Court in *Adarand* repeatedly made clear that only those racial classifications which grant a "special preference" based "purely" on race, "subject[] [a] person to unequal treatment," "treat[] any person unequally because of his or her race," "disadvantage[]" an individual "because of his or her race," impose "disparate treatment" on the basis of racial characteristics, or require individuals to bear "burdens" on the basis of their membership in particular racial or ethnic groups are constitutionally suspect. *Id* at 224-236. The relevant consideration, according to the Court, was not the use of rac[illegible], but whether there was discriminatory or preferential treatment that conferred a benefit on members of one racial group and a corresponding detriment on members of another. *Id*[9]

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[8] Interestingly, this was the exact position taken by the Governor and Attorney General before the Ninth Circuit in *Wilson*. They specifically argued in support of the constitutionality of Proposition 209 that school desegregation measures "adopted to achieve integration do not result in preferential treatment but equal treatment" (Appellants' Opening Brief at p. 27, attached to HBUHSD's Request for Judicial Notice) and "desegregation through pupil assignments and busing do not involve preferences" (Appellants' Reply Brief at p. 14 n. 6, attached to HBUHSD's Request for Judicial Notice).

Thus, state action that merely ensures equal treatment without denying anyone a concrete benefit is permissible under established equal protection law. Accordingly, the Court should hold that nonpreferential and nondiscriminatory state action is permissible under Proposition 209.

4. Established Supreme Court Precedent Recognizes The Broad Discretion That Local School Districts Have To Develop Educational Policies That Prevent School Segregation And Also Explicitly Sanctions Policies Aimed At Maintaining Appropriate Racial Balances In Schools.

To interpret Proposition 209 to prohibit voluntary desegregation programs would conflict with established federal law recognizing the broad powers of school districts to develop educational policy in the area of school desegregation. In fact, the United States Supreme Court explicitly has endorsed the use of race in student assignments:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

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[9] Both federal and state courts have long recognized the distinction between state action that confers racial preferences and state action that uses race to secure equal protection, upholding the latter as constitutional. *See, e.g., Associated General*, 616 F.2d at 1386 (distinguishing between state action that ensures "equality of opportunity" and state action that "specifically favors members of minorities in the competition with members of the majority for benefits that the state can give to some citizens but not to all"); *Domar Electric, Inc v. City of Los Angeles* (1995) 41 Cal.App.4th 810, 826 (holding that because outreach program did not offer a "preference" it was "race . . . neutral" and not subject to strict scrutiny); *Bolin v. San Bernardino City Unified School District* (1984) 155 Cal.App.3d 759, 764 (finding that because "no economic interest is at stake . . . . [t]he faculty integration plan . . . does not discriminate").

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Swann v. Charlotte-Mecklenburg Board of Education (1971) 402 U.S. 1, 16 Therefore, even though a federal court can order race-based school assignments only where there has been a constitutional violation, "school authorities whose powers are plenary" are free to adopt such race-conscious measures without any constitutional violation. *Id.*; *see also North Carolina State Bd. of Educ. v. Swann* (1971) 402 U.S. 43, 45 (reaffirming that school authorities have "wide discretion in formulating school policy" and "that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements"); *Crawford v. Board of Education* (1982) 458 U.S. 527, 535-536 (stating that California "school districts retain a state-law obligation . . . to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation").

For example, as noted above in *Washington v. Seattle*, the Supreme Court reinstated the authority of the City of Seattle – a jurisdiction having no history of state-sponsored racial segregation – to transport students to receive the benefits of an integrated education. The Court reiterated that "in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process." 458 U.S. at 473. Explaining the value of Seattle's efforts to overcome de facto segregation, the Court cited *Brown v. Board of Education* and its progeny for the proposition that "[a]ttending an ethnically diverse school" helps "minority children . . . achieve their full measure of success" while "teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage." *Id.* at 472-473 The *Seattle* Court specifically approved the reasoning of *Lee v. Nyquist*, which invalidated on Equal Protection grounds a statute divesting the New York Commissioner of Education of authority to require school boards to adopt measures aimed at achieving racial balance. *Id.* at 469-470.

These Supreme Court pronouncements, each of which endorses the authority of school districts to adopt racial balancing or race-conscious student assignment policies, clearly ratify the constitutionality of such voluntary efforts. Not surprisingly, Petitioner conveniently ignores this precedent.

5. Both California And Federal Courts Have Upheld Nonpreferential Race-Conscious School Assignment Policies As Constitutional.

Long before the passage of Proposition 209, the California Supreme Court explicitly rejected the argument that race-based school assignments constituted an unconstitutional racial classification. *Johnson*, 3 Cal.3d 937. The Court in *Johnson* specifically held that "[t]he assignment of a pupil to a school beyond reasonable walking distance from his [or her] home for the purpose of improving racial balance within the school district does not deny [a student] the equal protection of the laws." *Id.* at 949. The *Johnson* Court explained that "the presence of racial isolation . . . . [and] '[s]egregation, regardless of its cause, is a major factor in producing inferior schools, and unequal educational opportunity.'" *Id.* at 949-950 (citations omitted).[10] Accordingly, the Court in *Johnson* concluded that racial balance policies used for the purpose of integrating schools do "not deny, but secure[], the equal protection of the laws." *Id.* at 951.

Likewise, federal courts consistently have held that nonpreferential, race-conscious student assignment policies are permissible under the federal constitution. For example, the Second Circuit Court of Appeals in *Parent Ass'n of Andrew Jackson High School v. Ambach* (2d Cir. 1984) 738 F.2d 574, 577, held that reducing de facto segregation is a compelling state interest that would permit school officials to deny student transfers that result in further racial isolation.[11] Similarly, in *Martin v School District of Philadelphia* (E D.Pa. September 21, 1995) 1995 WL 564344, * 3, the district court upheld the constitutionality of a race-conscious student transfer policy that was adopted to remedy de facto segregation, finding that "burdens on students who are denied transfers . . . is relatively light . . [because] they never face the possibility that they will be involuntarily transferred or denied an adequate education." Other federal courts also have rejected Equal Protection challenges to school assignment policies aimed at ameliorating conditions of school segregation.[12] In short, there is no question that school districts have the authority to adopt nonpreferential desegregation programs, including race-conscious school assignment policies, without offending the federal or state constitutions.[13]

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[10] The *Johnson* Court approvingly cited to the 1967 report of the United States Commission on Civil Rights which found that "all other factors being equalized, [blacks] in segregated schools have lower educational achievement than [blacks] in integrated schools" and that "the transfer of [blacks] to integrated institutions . . . substantially betters their educational performances without harming the performance of white students." 3 Cal.3d at 949. More recent studies and scholars confirm the benefits of an integrated education to both minority and Anglo students. *See* Janet W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in *Handbook of Research and Multicultural Education* 597, 599-602 (James A. Banks ed., 1995) (finding that desegregation of schools yields enhanced achievement for African American students, particularly when undertaken on a voluntary basis, and leads to a better acceptance of racially mixed settings among both minorities and whites); Jomills H. Braddock II, Robert L. Crain, & James M. McPartland, *A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults*, Phi Delta Kappan 259, 260 (1984) (noting that "desegregation puts majorities and minorities together so they can learn to co-exist"); James M. McPartland & Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation* in *Effective School Desegregation* 141, 146-149 (Willis D. Hawley ed., 1981) (finding that graduates of desegregated schools are more likely to choose desegregated colleges, neighborhoods, and work places as adults).

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[11] *See also Brewer v. West Irondequeit Central School Dist* (2nd Cir. 2000) 212 F.3d 738, 751 (reaffirming that "local school boards have the power to voluntarily remedy de facto segregation existing in schools")

[12] *See, e.g., Jacobson v. Cincinnati Bd. of Educ.* (6th Cir. 1992) 961 F.2d 100, 103 (upholding race-conscious teacher transfer policy); *Kromnick v. Philadelphia Bd. of Educ.* (3d Cir. 1984) 739 F.2d 894, 903 (holding race-conscious teacher transfer policy survived strict scrutiny); *Comfort v. Lynn School Committee* (D. Mass. May 31, 2000) 2000 WL 791362, * 8 (denying injunction sought by parents because transfer policy not race preferential); *Willan v. Menomonee Falls School Board* (E.D. Wis. 1987) 658 F.Supp. 1416, 1422-1425 (upholding as constitutional voluntary integration plan for interdistrict transfers to promote racial integration).

[13] The few federal courts that have struck down race-based school assignment policies involved situations in which race was used as a preference to determine admission to a magnet program, or to provide some other scarce educational benefit. *See, e.g., Eisenberg v. Montgomery County Public Schools*, 197 F.3d 123, 125 (4th Cir. 1999) (student denied transfer to magnet program); *Tuttle v. Arlington County School Board* (4th Cir. 1999) 195 F.3d 698, 704 (admission denied to oversubscribed alternative school that had different teaching format). Further, to the extent the Fourth Circuit has suggested that "nonremedial racial balancing is unconstitutional" (*Tuttle*, 195 F.3d at 704), such a conclusion represents a minority view among federal courts and is inconsistent with California decisions. *See* fn. 10 and fn. 13, and accompanying text. Unlike the New York schools in ***Andrew Jackson*** and ***Brewer*** and the California school districts here, the school districts in *Tuttle* and *Eisenberg* apparently did not have any affirmative duty under state law to prevent and remedy de facto segregation. The goal here, as was the goal of the districts in *Andrew Jackson, Brewer*, and *Martin*, is to ameliorate existing racial isolation in particular schools, not to allocate spaces in a magnet program. Under these circumstances, *Tuttle* and *Eisenberg* are clearly inapposite.

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C. Interpreting Proposition 209 As Prohibiting School Desegregation Programs Would Not Only Contravene California's Constitutional Mandate To Prevent And Remedy School Segregation But Would Also Raise Constitutional Problems For Both The Open Enrollment Statute And Local School Districts.

1. Petitioner's Proposed Interpretation Of Proposition 209 Would Create A Direct Conflict With California's Equal Protection Clause And Implicitly Repeal Well-Established California Supreme Court Precedent.

Interpreting Proposition 209 to prohibit race-conscious desegregation measures would contravene California's constitutional mandate for schools to implement educational programs that reduce or eliminate racial segregation. Indeed, under California law, voluntary school desegregation programs have a unique status: they are both specifically sanctioned by the California Constitution and, where there is de facto segregation, constitutionally required under California Supreme Court precedent.

Article I, Section 7 of the California Constitution, which largely parallels the Fourteenth Amendment of the United States Constitution, contains the state's equal protection clause. Section 7 also contains an express provision permitting voluntary integration programs: "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan." Cal. Const. Art. I, § 7, cl. (a). This portion of Section 7, like Proposition 209, became part of the California Constitution through the initiative process in 1979. In light of the inclusion of this specific provision, the People of California have made clear that this State's equal protection clause does not prohibit voluntary integration programs.

In addition, the California Supreme Court has interpreted the equal protection clause of the California Constitution as requiring school districts to prevent and remedy de facto segregation: "local school boards in this state bear a constitutional obligation [under Article I, section 7] to undertake reasonably feasible steps to alleviate . . . racial isolation in the public schools, *regardless of the cause of such segregation.*" *Crawford* v. *Board of Education of Los Angeles* (1976) 17 Cal.3d 280, 284 (emphasis in original). According to the Court, "[o]ften the most effective program, and at times the only program, which will eliminate segregated schools requires pupil reassignment and busing." *Johnson*, 3 Cal.3d at 955.

The State Supreme Court has also stressed that a school district's obligation to "avoid 'racially specific' harm to minority groups takes on special constitutional significance with respect to the field of education, because, at least in this state, education has been explicitly recognized for equal protection purposes as a 'fundamental interest.'" *Crawford*, 17 Cal.3d. at 297. Therefore, under California law, school boards "bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory results." *Id.* at 309. The California Constitution places upon schools a greater duty to desegregate than the federal Constitution, which limits redress to instances of intentional segregation. *See Crawford*, 458 U.S. at 535.

Therefore, without a doubt, the legal status of voluntary school desegregation programs, including race-conscious student assignment policies, rested on solid constitutional footing at the time Proposition 209 was passed. Petitioner's broad interpretation of Proposition 209, however, would not only implicitly repeal well-established California Supreme Court precedent but also would create a direct conflict with the state's equal protection clause.

Such a result is expressly prohibited by California law:

> "[T]he law shuns repeals by implication, particularly where, as here, 'the prior act has been generally understood and acted upon.' . . . . So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, '[i]n order for the second law to repeal or supercede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.'"

Board of Supervisors v. Lonergan (1980) 27 Cal.3d 855, 868 (citation omitted). "'To overcome th[is] presumption, the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" *Western Oil & Gas Ass'n v. Monterey Bay Unified Air Pollution Control Dist.* (1999) 49 Cal.3d 408, 419. California law "places an obligation on courts to reconcile conflicts between statutes and constitutional provisions to avoid implying that a later enacted provision repeals another existing statutory or constitutional provision." *In re Lance*, 37 Cal.3d at 886.[14]

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[14] The California Supreme Court also has made clear that a specific provision in the state Constitution always controls over one that is more general:

> "It is well settled . . . that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the

Continued

Under these established principles of constitutional construction, it is clear that Proposition 209 cannot be interpreted as Petitioner proposes. Because Proposition 209 only reaches preferential and discriminatory conduct, and since school desegregation programs are generally not preferential or discriminatory, Proposition 209 and section 7 of the California Constitution are "[]reconcilable" and "[]consistent" and therefore must be given "concurrent operation." *See Western Oil*, 49 Cal.3d at 419. Moreover, because the state equal protection clause "has been generally understood and acted upon," Proposition 209 cannot be interpreted to create a direct conflict with section 7 of the Constitution or implicitly to repeal well-established California law. *See Lonergan*, 27 Cal.3d at 868. If Proposition 209 were meant to do away with Section 7 and to reverse long-standing California Supreme Court precedent, the text of Proposition 209 and supporting ballot materials would have explicitly stated so. *See id* Thus, there should be no dispute that after Proposition 209 the California Constitution continues to guarantee and permit voluntary desegregation measures, including race-conscious student assignment policies.[15]

> latter, standing alone, would be broad enough to include the subject to which the more particular provision relates."

San Francisco Taxpayers Ass'n v. Board of Supervisors (1992) 2 Cal.4th 571, 577 (citation omitted). Thus, the "general" provision here – Proposition 209 – should be "controlled" by the "specific" constitutional language that expressly sanctions voluntary integration programs, i.e., Article I, Section 7.

[15] Contrary to Petitioner's assertion in his opening brief at page 13, *Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315 does not compel a different result. At issue in *Santa Barbara* was the constitutionality of an initiative that purported to prohibit all race-conscious student assignments and to repeal several statutory and administrative provisions which required school districts "to achieve specific 'racial balance'" targets among students at their schools. *Crawford*, 17 Cal.3d at 292. The Court in *Santa Barbara* struck down the prohibition on race-based assignments as unconstitutional while upholding the validity of the rest of the initiative. *Id.* at 292-293. The Court simply held that because "racial balanc[ing] determined according to a precise statutory formula is not a constitutional prerequisite but a matter of state policy," the People of California were entitled to repeal the racial balancing provisions through the initiative process. *Santa Barbara*, 13 Cal.3d at 330. However, the *Santa Barbara* Court explicitly stated that its decision "can in no way limit or affect the constitutional obligations of school districts." *Id.* The mere fact voters were able to repeal the provisions at issue in *Santa Barbara* does not support Petitioner's broad interpretation of Proposition 209 here. Simply because specific racial balancing targets are not constitutionally mandated does not mean that race-conscious student assignments under a racial balancing policy are unconstitutional. *See Brewer*, 212 F.3d at 752 ("the absence of a duty sheds little light on the constitutionality of a voluntary attempt"). There is no question that voluntary school desegregation measures, including race-conscious student assignments, are still permitted under the California Constitution even after *Santa Barbara*. As the United States Supreme Court stated in *Crawford*, seven full years after the *Santa Barbara* decision: "school districts themselves retain a state-law obligation to take reasonable feasible steps to desegregate, *and they remain free to adopt reassignment and busing plans to effectuate desegregation*." 458 U.S. at 535-536 (emphasis added).

2 Interpreting Proposition 209 As Prohibiting Voluntary School Desegregation Measures Would Render The Open Enrollment Statute Unconstitutional.

To the extent that Proposition 209 is interpreted to limit the ability of school boards to prevent racial segregation through the use of race-conscious measures, this interpretation would render the open enrollment law unconstitutional. Stripping local school boards of the authority to maintain "appropriate racial and ethnic balance" in the schools would in effect allow parents to use open enrollment to avoid minority schools, thereby resulting in impermissible segregation or resegregation in California schools. As the California Supreme Court has warned:

> An enactment which by flat legislative fiat, prohibits any and all [race-based] assignments, exorcising a method that in many circumstances is the sole and exclusive means of eliminating racial segregation in the schools, necessarily legislates the preservation of racial imbalance . . . . [and] therefore violates constitutional imperatives.

Johnson, 3 Cal.3d at 943.

The real possibility that parental choice under the guise of "open enrollment" will result in segregation and resegregation of schools is precisely the danger that the California Supreme Court in *Johnson* warned against. The *Johnson* Court explained that pupil assignment decisions were a state function and that making "individual parents active participants in the pupil assignment process" may "very likely condemn the possibility of removing racial imbalance in the schools." *Id.* at 952. When parents are given authority to decide which school their children will attend within a district, they "are endowed by the State with powers or functions governmental in nature." *Id.* Accordingly, "[t]he parental decision to grant or withhold consent to pupil assignment, as an integral part of the educational structure, is subject to the provisions of the Fourteenth Amendment." *Id.* at 952-953. Without such constitutional limitation, the California Supreme Court noted, "[s]uch a [law] would be unconstitutional on its face." *Id.* at 954.

Thus, under established California Supreme Court precedent, neither the state nor local school districts can allow the open enrollment law to be turned into a vehicle by which "private persons . . . inject the venom of racial discrimination into the veins of government." *Id.* The open enrollment statute precisely guards against this unconscionable result by granting school boards discretion – consistent with their state and federal obligations – to adopt policies that ensure an appropriate racial balance in schools. This Court is therefore compelled under *Johnson* to uphold the open enrollment statute as currently written.

3. Interpreting Proposition 209 As Prohibiting Voluntary School Desegregation Measures Would Subject California School Districts To Liability For De Jure Segregation.

Given a school district's affirmative duty to prevent and remedy segregation under state law, implementation of an educational policy that exacerbates ethnic imbalance in its schools may subject a school district to liability under federal law for de jure segregation.

For example, the Ninth Circuit in *Diaz v. San Jose Unified School District* (9th Cir. 1984) 733 F.2d 660, 664, relying on evidence that a school district had ignored its state law obligations to avoid and cure de facto segregation, found de jure segregation to exist in the district. *Id.* at 667, fn. 7. *Id.* The *Diaz* Court held that the local school board violated its state constitutional obligations by establishing and adhering to a "neighborhood school" policy that although facially "neutral" and "constitutionally permissible" had the effect of "inflict[ing] a 'racially specific' harm on minority students when such a policy actually result[ed] in [a] segregated education." *Id* Among the polices condemned in *Diaz* was a transfer policy that "transformed one of the district's few ethnically balanced schools into an imbalanced school." *Id.* at 668.

Likewise, in *Crawford,* the California Supreme Court observed that implementation of "an open transfer policy [by the Los Angeles Unified School District] that permitted students to transfer out of their neighborhood schools . . . with knowledge that such a policy would exacerbate school segregation contributed to de-jure segregation." 17 Cal. 3d at 288-289. As the Court also noted in *Johnson*:

> so far as the [challenged statute] preserves even de facto segregation, by affording governmental support to such segregation, it casts the state itself in the unhappy role of the savior of de jure segregation, and fails constitutionally. . . . [The statute] does not assume a neutral stance respecting de facto segregation of schools; it moulds a medium of obstruction to the elimination of that evil. It prohibits the use of a method that may be essential to desegregation: pupil assignment without the requirement of parental consent. Yet the state cannot constitutionally countenance obstructionism, for once the state undertakes to preserve de facto school segregation, or to hamper its removal, such state involvement transforms the setting into one of de jure segregation.

Id. at 954, 958.

Thus, under both California and federal law, Proposition 209 cannot be interpreted to prohibit voluntary desegregation measures in those schools where racial segregation already exists, regardless of their cause. To do so not only would limit a school district's ability to prevent or remedy de facto segregation but also would subject school districts to violations of federal law. Such a result would be manifestly unfair and clearly unconstitutional.

III. CONCLUSION

As set forth above, Petitioner's facial challenge to Education Code section 35160.5 and HBUHSD's open enrollment policy has no merit. Accordingly, the petition for writ of mandate in this case must be denied.

DATED: July 17, 2000

Respectfully submitted,

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By: ______________________
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Diversity Assessment Questionnaire (DAQ)

PLEASE MARK ALL OF YOUR CHOICES ON THE SEPARATE ANSWER SHEET. ALL RESPONSES ARE STRICTLY CONFIDENTIAL. NO NAMES WILL BE ATTACHED TO THESE SURVEYS, WHICH WILL BE KEPT AT HARVARD UNIVERSITY.

In this study, we define racial and ethnic minority groups as African American, Asian American and Pacific Islander, Latino (Hispanic), and Native American.

Section 1: Your School and Classes

1) How many students in your **SCHOOL** are from racial or ethnic groups that are **different** from your own:
    a) A few
    b) Quite a few, but less than half
    c) About half
    d) Most

2) Which best describes your **ENGLISH** class: (If you have more than one, pick the one that is required by your school.)
    a) Basic
    b) College Preparatory
    c) Honors or AP
    d) A Mix of Levels
    e) Don't Know

3) How many students in your **ENGLISH** class are from racial or ethnic groups that are **different** from your own:
    a) A few
    b) Quite a few, but less than half
    c) About half
    d) Most

4) In your **ENGLISH** class, how often do you read about the experiences of many **different** cultures and racial and ethnic groups?

    a) At least 3 Times a Month
    b) Once or Twice a Month
    c) Less than Once a Month
    d) Never

5) During classroom discussions in your **ENGLISH** class how often are racial issues discussed and explored?
   a) At least 3 Times a Month
   b) Once or Twice a Month
   c) Less than Once a Month
   d) Never

If you are not currently taking a SOCIAL STUDIES or HISTORY class skip to question #10.

6) Which best describes your **SOCIAL STUDIES or HISTORY** class: (If you have more than one social studies class, pick the one that is required by your school.)
   a) Basic
   b) College Preparatory
   c) Honors or AP
   d) A Mix of Levels
   e) Don't Know

7) How many students in your **SOCIAL STUDIES or HISTORY** class are from racial or ethnic groups that are **different** from your own:
   a) A few
   b) Quite a few, but less than half
   c) About half
   d) Most

8) During classroom discussions in your **SOCIAL STUDIES or HISTORY** class how often are racial issues discussed and explored?
   a) At least 3 Times a Month
   b) Once or Twice a Month
   c) Less than Once a Month
   d) Never
   e) I am not taking a social studies class

9) To what extent do you believe that these discussions have changed your understanding of different points of view?
   a) Not at all
   b) A little
   c) Quite a bit
   d) A lot

If you are not currently taking a MATH class skip to question #12.

10) Which best describes your **MATH** class: (If you have more than one, pick the one that is required by your school.)
   a) Basic
   b) College Preparatory
   c) Honors or AP

   d) A Mix of Levels
   e) Don't Know

11) How many students in your **MATH** class are from racial or ethnic groups that are **different** from your own:
   a) A few
   b) Quite a few, but less than half
   c) About half
   d) Most

If you are not currently taking a SCIENCE class skip to question #14.

12) Which best describes your **SCIENCE** class: (If you have more than one, pick the one that is required by your school.)
   a) Basic
   b) College Preparatory
   c) Honors or AP
   d) A Mix of Levels
   e) Don't Know

13) How many students in your **SCIENCE** class are from racial or ethnic groups that are **different** from your own:
   a) A few
   b) Quite a few, but less than half
   c) About half
   d) Most

14) Which best describes your current **FOREIGN LANGUAGE** class?
   a) First Year
   b) Second Year
   c) Third Year
   d) Fourth Year or AP
   e) I am not taking a foreign language class

15) To what extent have your **teachers** encouraged you to attend college?

a)	b)	c)	d)	e)
Strongly Encouraged	Somewhat Encouraged	Neither Encouraged Nor Discouraged	Somewhat Discouraged	Strongly Discouraged

16) To what extent have your **counselors** encouraged you to attend college?

a)	b)	c)	d)	e)
Strongly Encouraged	Somewhat Encouraged	Neither Encouraged Nor Discouraged	Somewhat Discouraged	Strongly Discouraged

17) How much information about college admissions have your **teachers** given you? (such as SAT, ACT, financial aid, college fairs, college applications)

a) A lot   b) Some   c) A Little   d) None

18) How much information about college admissions have your **counselors** given you? (such as SAT, ACT, financial aid, college fairs, college applications)

a) A lot b) Some c) A Little d) None

19) To what extent have your **teachers** encouraged you to take Honors and/or AP classes?

a)	b)	c)	d)	e)
Strongly Encouraged	Somewhat Encouraged	Neither Encouraged nor Discouraged	Somewhat Discouraged	Strongly Discouraged

20) To what extent have your **counselors** encouraged you to take Honors and/or AP classes?

a)	b)	c)	d)	e)
Strongly Encouraged	Somewhat Encouraged	Neither Encouraged nor Discouraged	Somewhat Discouraged	Strongly Discouraged

Section 3: Your Classroom

Please choose the letter that best indicates your level of agreement or disagreement with each statement.

21) If I try hard I can do well in school.

a)	b)	c)	d)	e)
strongly agree	somewhat agree	neither agree nor disagree	somewhat disagree	strongly disagree

22) My teachers administer punishment fairly.

a)	b)	c)	d)	e)
strongly agree	somewhat agree	neither agree nor disagree	somewhat disagree	strongly disagree

23) At least one of my teachers takes a special interest in me.

a)	b)	c)	d)	e)
strongly agree	somewhat agree	neither agree nor disagree	somewhat disagree	strongly disagree

24) My teachers encourage me to work with students of other racial/ethnic backgrounds.

a)	b)	c)	d)	e)
strongly agree	somewhat agree	neither agree nor disagree	somewhat disagree	strongly disagree

25) After high school, how prepared do you feel to work in a job setting where people are of a different racial or ethnic background than you are?

a) Very Prepared b) Somewhat Prepared c) Somewhat Unprepared d) Very Unprepared

26) How do you believe your school experiences will effect your ability to work with members of other races and ethnic groups?

a) Helped a lot

b) Helped somewhat
c) Had no effect
d) Did not help
e) Hurt my ability

27) How comfortable would you be with a work supervisor who was of a different racial or ethnic background than you?
a) Very comfortable
b) Somewhat comfortable
c) Somewhat uncomfortable
d) Very uncomfortable

Please indicate how comfortable are you with each of the following in your classes:

	a) Very Comfortable	b) Comfortable	c) Uncomfortable	d) Very Uncomfortable	e) Does Not Apply
28) discussing controversial issues related to race					
29) working with students from different racial and ethnic backgrounds in group projects					
30) learning about the differences between people from other racial and ethnic groups					
31) working with students from other language backgrounds					
32) working with students from different countries					
33) debating current social and political issues					

34) I work on school projects and/or study with people of other racial, ethnic or linguistic groups.
a) Never
b) Less than Once a Month
c) Once or Twice a Month
d) Three or More Times a Month

Section 4: Your Interests and Future Goals

35) How likely are you to go to a college that has students of different racial and ethnic backgrounds?
   a) Very likely
   b) Likely
   c) Unlikely
   d) Very unlikely
   e) I do not plan to attend college

36) How likely do you think it is that you will work with people of racial and ethnic backgrounds different from your own?
   a) Very likely
   b) Likely
   c) Unlikely
   d) Very unlikely

Please tell us how interested you are in the following:

	a) Very Interested	b) Interested	c) Somewhat Interested	d) Not Interested
37) taking a foreign language after high school				
38) taking an honors or AP mathematics course				
39) taking an honors or AP English course				
40) going to a community college				
41) going to a four-year college				
42) taking a computer science course				
43) taking a course focusing on other cultures after high school				
44) traveling outside the United States				
45) attending a racially/ethnically diverse college campus				
46) living in a racially/ethnically diverse neighborhood when you are an adult				
47) working in a racially/ethnically diverse setting when you are an adult				

48) How do you believe your school experiences will effect your ability to understand members of other races and ethnic groups?
a) Helped a lot
b) Helped somewhat
c) Had no effect
d) Did not help
e) Hurt my ability

Section 5: Your School and Your Community

NOTE: In this section, we are interested in how your experiences in high school have effected your interest in your community and the world. We understand that your family and friends may have also had a great effect in these areas, but, for this survey, we ask that you focus on the effect of your school on these topics.

In the following items indicate to what extent classroom or extracurricular activities offered through your high school changed your interest in:

	a) Greatly Increased	b) Somewhat Increased	c) No Effect	d) Somewhat Decreased	e) Greatly Decreased
49) current events					
50) reading about what is happening in other parts of the world					
51) volunteering in your community					
52) joining a multi-cultural club					
53) participating in elections					
54) staying informed about current issues facing your community and country					
55) taking leadership roles in your school					
56) living in a racially/ethnically diverse setting when you are an adult					
57) working to improve relations between people from different backgrounds					
58) running for public office some time in the future					
59) taking leadership roles in your community					
60) voting for a Senator or President from a minority racial/ethnic group					

Section 6: Tell Us About Yourself:

61) Were you born in this country? a) yes b) no

62) What is your race/ethnicity? (if mixed-race, circle no more than two)
   a) African American
   b) Asian American
   c) Hispanic/Latino
   d) White
   e) Other

63) Are you? a) male b) female

64) What grade are you in?
   a) 9th b) 10th c) 11th d) 12th

65) What is the main language that your family speaks at home?
   a) English
   b) Spanish
   c) Chinese
   d) Other Asian
   e) Other

66) How many languages do you speak fluently?
   a) 1 b) 2 c) 3 d) more than 3

67) How many students in your home **NEIGHBORHOOD** are from racial or ethnic groups that are **different** from your own?
   a) A few
   b) Quite a few, but less than half
   c) About half
   d) Most

68) Please indicate your Mother or female guardian's highest level of education (Choose only one):
   a) Some high school
   b) High school graduate
   c) Some College (less than 4 years)
   d) College graduate (with Bachelors degree)
   e) Graduate degree, (such as a masters law, M.D., Ph.D.)

69) Please indicate your Father or male guardian's highest level of education (Choose only one):
   a) Some high school
   b) High school graduate
   c) Some College (less than 4 years)

d) College graduate (with Bachelors degree)
e) Graduate degree, (such as a masters law, M.D., Ph.D.)

N

d. Notice

The Board shall make every effort to notify teachers who will be subject to RIF procedures as soon as possible during the school year.

(8) Priority as Long Term Substitutes

Teachers who have been RIFed shall be given priority for long term substitute positions for which they are qualified.

§300 GRIEVANCE PROCEDURE

1. Definitions

a. Grievance

A "grievance" shall mean a complaint in writing that there has been an alleged violation, misinterpretation or misapplication of any provision(s) of this contract, which arose during the term of this contract or the predecessor contract. Such grievance shall be submitted on the prescribed form which shall be available in the school office and from a Federation Representative.

b. Grievant

The "grievant" shall mean the teacher, teachers, or the Federation filing the grievance.

c. Days

The term "days," when used in this section, shall mean contract working days unless otherwise indicated. Thus, weekends, holidays, and vacation/recess days are excluded. Summer break is excluded except as indicated in Paragraph (8), below.

2. General Provisions

a. Purpose

Good morale is maintained by sincere efforts of all persons concerned to work toward constructive solutions to problems in 'an atmosphere of courtesy and cooperation. The purpose of this procedure is to secure equitable solutions to problems at the lowest possible administrative level. The grievance proceedings shall be kept as informal and confidential as may be appropriate at any level of the procedure.

b. Conference

Prior to the formalizing of any grievance into writing, the employee may request a conference with the supervisor for the purpose of presenting a complaint, as well as the possible resolution of the complaint. It shall be the employee's prerogative to have a Federation representative present at such conference or at any other step in the grievance procedure.

c. Federation Right

The Federation shall have the right to appear at any level of the grievance procedure and shall receive copies of all written decisions and records pertaining to the grievance.

d. Rights of Grievant/Representative

Every teacher shall be represented by the Federation in the grievance procedure. The teacher shall have the right to be present at any grievance discussion and shall be present at any grievance discussion when the Board and/or the Federation deems it necessary. When the presence of a teacher at a grievance hearing is requested by either party, illness or other incapacity of the teacher shall be grounds for any necessary extension of grievance procedure time limits.

The failure of the grievant to act on any grievance within the prescribed time limits will act as a bar to any further appeal and any administrator's failure to give a decision within the time limits permits the grievant to proceed to the next step. The time limits, however, may be extended by mutual agreement.

e. Protection of Grievant

An employee who participates or intends to participate in any grievance as defined herein shall not be subjected to discipline, reprimand, warning or reprisal because of such participation or intention. All documents, communications, and records dealing with the processing of the grievance shall be filed separately from the personnel files of the participant.

f. Hearings, Conference, and Processing

Hearings and conferences under this procedure shall be conducted at a time and place which will afford a fair and reasonable opportunity for all persons, including witnesses entitled to be present, to attend and will be held, insofar as possible, after regular school hours or during non-teaching time of personnel involved. When such hearings and conferences are held at the option of the administration during school hours, all employees whose presence is required shall be excused, without loss of pay or benefits, for that purpose.

It is agreed that any investigation or other handling or processing of any grievance by the grievant or administration shall be conducted so as to result in no interference with or interruption whatsoever of the instructional program and related work activities of school personnel.

g. Expediting Grievance

Grievances shall be expedited. Every effort shall be made to resolve grievances prior to the end of the school year in which the grievance was filed. The time limits specified may be extended by mutual agreement.

h. Reducing Time Limits

(1) If a grievance is filed which might not be finally resolved under the time limits set forth herein prior to the end of the school year, and which if left unresolved until the beginning of the following school year, could result in irreparable harm to those involved in the grievance, the time limit set forth herein shall be reduced so that the grievance procedure may be concluded prior to the end of the school year.

(2) If a grievance is filed prior to the end of the school year and cannot be resolved by the closing of that school year, the grievance procedure shall continue into the summer break with all time limits doubled.

(3) There shall be no arbitration during the summer unless both the CFT and the Board agree.

(4) Any complaint arising over the summer break which is not resolved before the beginning of the school year, may be filed as a grievance two weeks before the first day of school. All time limits shall be enforced at that time.

i. Labor Relations Administrator/CFT Field Representative Meetings

The Superintendent's designee for Labor Relations and the Federation Field Representatives shall meet bi-weekly to discuss outstanding grievances and/or other contractual issues. Attempts to resolve any outstanding issues should, as a professional courtesy, be discussed with the principal before a grievance is filed.

3. Procedure

a. Level One

A grievance must be filed in writing with the principal or the appropriate administrator within fifteen (15) days after said event, upon which it is based, or within fifteen (15) days after said event could reasonably be assumed to have been known by either a teacher or the Federation. The grievance conference shall occur within five (5) days after the grievance is filed. The grievant shall be accompanied by the Federation Building Representative or any other Federation representative of the grievant's choosing. The principal or appropriate administrator shall render a written decision within five (5) days of the grievance conference.

b. Level Two

In the event a grievance has not been satisfactorily resolved at Level One, the Federation shall file, within ten days of the principal's or the appropriate administrator's written decision at Level One, a completed copy of the grievance with the Superintendent or his/her designee. Within five (5) days after such written grievance is filed, the grievant, the Federation, and the Superintendent or his/her designee should meet to resolve the grievance. The Superintendent or his/her designee shall file his/her decision within five (5) days of the Level Two meeting and communicate it to the grievant and the Federation.

At the request of either the Board or the Federation, grievance mediation shall occur prior to the Level Two grievance conference. The Board and Federation shall agree, by October 1, 1994, on an agency, individual, or panel to provide such mediation services. The parties shall develop specific procedures for grievance mediation, with the assistance of the mediator.

If grievance mediation is requested, time limits are suspended until the mediation occurs. A formal Level Two conference shall be conducted within 5 days of the final mediation session, unless the grievance is resolved through mediation. Thereafter, the normal time limits shall be observed.

c. Level Three

If the grievance has not been satisfactorily resolved at Level Two, the Federation may demand arbitration within 90 days of receiving the Level Two decision. The arbitrator's decision shall be final and binding.

(1) The Board and the Federation shall agree on a panel of five (5) arbitrators to hear and decide cases for one (1) year on a rotating basis.

(2) The arbitrator selected to consider a particular grievance shall be that arbitrator next in order of rotation who can schedule the hearing with the parties within thirty (30) days.

(3) The parties shall accept a date(s) offered within the 30 days or as soon thereafter as dates are available, unless the time limit is extended by mutual agreement. Unavailability of the parties representatives shall not be a valid reason for refusing all such dates offered by arbitrators on the panel.

(4) If more than one arbitration hearing is pending at any time, the date of the initial filing of the grievance shall determine the order of rotation of the arbitrators.

(5) After any arbitrator on the panel has rendered an award, either party, within fourteen (14) days, may remove such arbitrator from the panel. In addition, if either party so requests by August 1 of any school year, one or more arbitrators shall be removed from the panel. In either event, the parties shall attempt to agree on additional arbitrator(s) to complete the panel. If the parties are unable to agree on additional arbitrator(s) within fourteen (14) days of the removal of an arbitrator from the panel, the parties shall request a list or lists, as the case may be, of seven (7) arbitrators each from the Federal Mediation and Conciliation Service. The parties shall then alternately strike

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names from the list(s) until the number of arbitrators remaining equals the number needed to complete the panel of five (5) arbitrators.

(6) The arbitrator shall not have the authority to alter, modify, add to or subtract from any of the terms of this contract.

(7) The costs for the services of the arbitrator shall be shared equally by both parties.

(8) Post-hearing briefs, if any, shall be filed within twenty (20) days of the receipt of transcript, or within twenty (20) days of the close of the hearing if no transcript is ordered. The arbitrator shall render a decision in writing within thirty (30) days after post-hearing briefs have been submitted or within thirty (30) days after the hearing, if no briefs are to be filed.

(9) The Arbitrator's decision shall be final and binding upon the Board, Federation, and grievant(s). Within 30 days after receiving an arbitrator's written opinion, the Board of Education shall ratify and initiate implementation of the decision of the arbitrator.

d. Teacher Termination

Binding arbitration is provided at Level Two upon waiver of statutory proceedings by the affected teacher on all teacher dismissal cases. Dismissal of an intern teacher is covered under the provisions of §210.1.p.(6), not by this provision.

e. Teacher Non-Renewal (5 years satisfactory service

A non-tenured teacher who has completed five consecutive years of satisfactory or better service has the right to file a grievance challenging the Board's decision not to renew his/her contract and to pursue that grievance to final and binding arbitration.

f. Teacher Non-Renewal (less than 5 years service

In lieu of statutory proceedings, a non-tenured teacher with less than 5 consecutive years of satisfactory or better service shall have the right to a hearing before a Board appointed referee, selected by agreement between the Board and the Federation to hear such appeals, provided the teacher submits a written request to the Superintendent for such a hearing within 10 days of receiving written notice of the Superintendent's recommendation not to re-employ the teacher. The appointed referee may serve no longer than one year, unless the parties agree to extend his/her appointment.

Such hearings shall be held before the Board acts on the Superintendent's recommendation not to re-employ the teacher. However, the teacher's request for a hearing shall automatically extend the deadline for notification of non-renewal through May 31.

At the hearing, the Superintendent, or his/her designee, shall summarize the teacher's evaluation and the reasons for the non-renewal recommendation and shall present any supporting documentation or witnesses within two hours and the teacher shall have the opportunity to present his/her appeal along with any supporting documentation or witnesses within a two hour period. The teacher shall have the right to representation by the Federation.

The decision of the referee shall be in the form of a recommendation to the Board of Education.

g. Alternate Procedure

Certain grievances filed by teachers regarding personnel decisions shall be assigned to an alternate internal dispute resolution procedure for a prompt, final, and binding decision if the grievance is not resolved at Level I. Such grievances are those that involve applying contract language to a specific incident or administrative decision and in which the meaning or intent of contract provisions is not in dispute. Grievances eligible for this procedure shall include those which contest an assignment, surplussing, or placement decision, layoff or recall decision, selection of a teacher for ESP positions or for eligibility lists, provided the above stipulations apply. This procedure shall not apply to cases which involve discipline or dismissal.

Grievances assigned to this procedure shall be considered by an internal appeals panel, consisting of 2 teachers appointed by the Federation and 2 administrators appointed by the Superintendent. In the event of a tie vote of the panel, the grievant shall have immediate access to Level Three of the grievance procedure.

On the Thursday and Friday two weeks before the end of each quarter, the Alternate Grievance Panel shall meet to resolve outstanding grievances. In addition, the Thursday and Friday two weeks before the opening of school, the Alternate Grievance Panel shall meet to resolve outstanding grievances filed during the summer. Other dates may be agreed to by the CFT and the Board. The grievant, the Federation, and the administration shall be responsible for providing pertinent information and documents to the panel members at least 5 days prior to the hearing. Such information shall include any data relevant to the case.

The panel shall consider the documentary evidence, hear testimony from any witnesses offered by the parties, and render a final and binding decision, including an appropriate remedy, consistent with the terms of this contract, at the close of the hearing. Neither party shall be represented by attorneys, except by mutual consent, but the grievant shall be entitled to representation by the Federation and the administration shall be appropriately represented. If any panel member has a conflict of interest in any grievance, they shall be temporarily replaced by the appropriate party.

The parties shall arrange appropriate training for members of the panel. The panel shall determine any other procedures it may require, subject to approval of the parties. Either party may terminate the entire alternate procedure described above by giving 30 days notice to the other party of its intention to terminate the procedure. In the event the procedure is terminated, all pending cases shall be assigned to Level Two of the grievance procedure.

4. Mediation for Lawsuits

In the event of a lawsuit between the parties, mediation shall occur at the request of either party, using the same service and procedure as in grievance mediation or using another dispute resolution procedure agreed to by the parties.

5. Common Grievance/Arbitration Record

The parties shall compile a common record of grievance activity. The record shall include all grievances filed, dates, a general statement of the issue, dates of grievance conferences, and dates of decisions at each step, and a statement of the final outcome. The data shall be reported annually to the Superintendent, Federation President, and Board of Education. The parties shall each designate a representative to be responsible for monitoring the compilation and reporting of this data. Decisions of the Alternate Grievance Panel and arbitration decisions shall be jointly reported by the Federation and the Board.

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Cincinnati Public Schools
Office of General Counsel

Alternate Grievance Panel Decision

In the matter of ______________________________

the following decision has been reached by the AGP:

Date: ______________

Signature of Panel Members: ______________________ ______________________

______________________ ______________________

OGC 1/95

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OFFICE OF
GENERAL COUNSEL

ALTERNATE GRIEVANCE PANEL GUIDELINES

The Alternate Grievance Panel will hold their meetings at Crest Hills Middle School/Staff Development Center. The Panel shall consist of three administrators and three teachers, one of whom on each side will be an alternate. Alternates will serve as facilitator and timekeeper with the two positions rotating. In the event a panel member feels he/she cannot sit in judgement on a particular case, the alternate will take his/her place and the panel member will become the facilitator/timekeeper.

MEETING DATES

Meeting dates are as listed per the contract.

TIMELINE

OPENING STATEMENTS: CFT and the Board: Five minutes each
PRESENTATION OF CASE: CFT and the Board: Twenty minutes each
CROSS EXAMINATION: CFT and the Board: Fifteen minutes each
CLOSING STATEMENTS: CFT and the Board: Five minutes each

Note: 1) During the closing statement, CFT can reserve part of their time to rebut

2) Questions can be asked anytime by the Panel during the presentation or cross examination. At the point of questioning, the timekeeper will stop the clock.

All witnesses should be announced at the beginning of the case. Witnesses must be presented within the continuous twenty minutes time frame. Only rebuttal witnesses can be called after the cross examination. Time should be limited to five minutes. Witness response should be precise and to the point whenever possible. The facilitator can intervene to keep all parties on task.

The Panel reserves the right to extend time limits if deemed necessary by a majority vote.

DECISIONS

After the grievant, administration, and advocates have presented their case, they will be excused for the Panel to discuss the issues. An open discussion will occur and then a vote will be taken. If possible, the interested parties will remain to hear the decision. No record of how anyone voted will be kept and the Panel is barred from discussing their rationale.

If the grievance is denied, no remedy is presented. If the grievant's case prevails, the remedy sought by the grievant will be reviewed first. In most cases this remedy will be accepted. If the remedy sought does not apply, the Panel members will agree on another remedy within the contract. If at all possible, time guidelines will be given.

April 2000

To Whom It May Concern:

Members of the Alternate Grievance Panel met after the regular session on March 23, 2000, and approved the following guidelines:

1. The agenda for the panel will be decided no later than the Friday preceding the scheduled meeting of the Alternate Grievance Panel. Any settlements of the cases, while encouraged, must be made *prior* to this time.
2. Members of the Alternate Grievance Panel will receive a *decisive and final* agenda no later than 48 hours preceding the meeting. Since the vast majority of panel members deal in providing services directly to students and must be able to plan accordingly, no changes after that time will be accepted.

NSBA COUNCIL OF SCHOOL ATTORNEYS' ADVOCACY SEMINAR

A School Law Retreat

Do Not Resuscitate Orders and Other Issues Related to Medically Fragile Students

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Federal law protects students with disabilities from discrimination and guarantees these students the right to a free appropriate public education in the least restrictive environment. When combined with advances in medical technology, an increasing number of schools educate children and adolescents who have special health care needs. Based upon recent court decisions, this trend will likely continue and school boards and administrators will be required to make difficult decisions regarding the education and care of medically fragile students. This is especially true when parents and children with serious illnesses or disabilities ask schools to honor their requests regarding the manner of the students' deaths.

MEDICALLY FRAGILE STUDENTS

The right of students with disabilities to attend public schools in the least restrictive environment is guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1401 *et seq.* ("IDEA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). Disabled students rights are also protected by the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"). Students with severe medical complications may require significant professional medical care to attend school and receive the benefit of their public education.

After the Supreme Court's decision last year in *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999), it is more clear than ever that schools must be prepared to support the integrated education of even profoundly disabled students. As recipients of federal funds, the public schools must provide all disabled children with a free appropriate public education ("FAPE") including any related services. Those related services include a broadly defined range of supportive services that are not excluded medical services. The Court reaffirmed its bright-line test first articulated in *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), under which excluded "medical services" are the services of a physician (other than for diagnostic and evaluation purposes).

Garret demonstrates the complex health services that districts are obligated to provide if they allow a student to attend school and benefit from a special education. Garret attended regular classes despite the fact that he was paralyzed from the neck down. Although he was able to speak and control his wheelchair with his breath, he was ventilator dependent. Garret breathed only with the use of a ventilator or a manual air bag attached to his tracheotomy tube when the ventilator was serviced. He required assistance with urinary bladder catheterization once a day, with suctioning his tracheotomy tube at least every six hours, with food and drink at lunchtime, and with getting into a reclining position for five minutes each hour.

The Court explained that despite the extensive, continuous, and costly care required for Garret to attend classes with other nondisabled students, it was the school district's responsibility. Unequivocally, the Court held that, "[u]nder the statute, [Supreme Court] precedent, and the purposes of the IDEA, the District must fund such 'related services' in order to help guarantee that students like Garret are integrated into the public schools." *Garret*, 526 U.S. at 79. Now that districts fund the "related services" that enable "students like Garret" to attend regular classes in public schools, more and more medically fragile students are likely to take advantage of this opportunity. For these medically fragile students, the possibility of death is a constant companion.

DO NOT RESUSCITATE

Although it was not an issue for Garret, and many other students receive significant health services in the public schools without ever having to address the issue, schools are increasingly faced with decisions involving end-of-life issues. With an increasing number of children and adolescents attending school with life-threatening disabilities and in the late stages of terminal illnesses, more frequently school districts are asked to respect a parent's request or a physician's order not to resuscitate a student. Many important competing interests and complex ethical issues make it difficult for school districts to respond to these requests.

Although the commonly used abbreviation for do not resuscitate ("DNR"), could have a more specific meaning in particular circumstances, it generally means an explicit directive not to use extraordinary procedures to continue human life. For instance, it has become an almost universal practice to perform cardiopulmonary resuscitation on someone who is suffering cardiac arrest. A DNR might be issued to prevent this. Similarly, a DNR might prohibit intubation and assistance with artificial respiration, or the use of certain drugs in particular circumstances. They are used only when, because of a terminal illness or condition, the inevitability of death is identifiable. However, there is some societal expectation that most people would rather remain alive and the state has a long-established interest in the preservation of life. Many of our laws today, in some way, support the state's interest in preserving life.

The United States Supreme Court had an opportunity to examine the Constitutional underpinning of what has been termed the "right to die," in *Cruzan vs. Director, Missouri Department of Health*, 497 U.S. 261 (1990). In fact, the "right" is defined more narrowly. "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [the Court's] prior decisions." *Id.* at 278. More recently the court reexamined the boundaries of the right to die, in relation to physician-assisted suicide. *See Washington v. Glucksberg*, 521 U.S. 702 (1997). In rejecting a broader right to die "which extends to a personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide," the court described the holding of *Cruzan* as suggesting, "that the due process clause protects the traditional right to refuse unwanted life saving medical treatment." *Id.* at 708, 720.

The Court developed this position by examining a long line of state cases that establish a clear common law doctrine of informed consent. This deeply rooted common-law right gave birth to a Constitutionally protected fundamental interest. The seminal case of *In re Quinlan*, 355 A.2d 647 (N.J. 1976), recognized a limited right to privacy, protected by the Constitution, that allowed a father to disconnect his daughter's respirator. The *Quinlan* court noted that the state's interest weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. *Id.* at 662-664. Likewise, in *Superintendent of Belchertown State School vs. Saikewicz*, 370 N.E.2d 417(1977), the court reasoned that an incompetent person retains the same rights as a competent person "because the value of human dignity extends to both."

Although courts have sometimes had to struggle with the right of competent individuals to exercise decisions regarding their receipt or denial of life-sustaining or emergency medical treatment, *see, e.g., Bouvia v. Superior Court*, 179 Cal. App. 3d 1127 (1986) (competent adult may ending feeding and hydration); *Bartling v. Superior Court*, 163 Cal. App. 3d 186 (1995) (competent adult may stop artificial life support), the greatest challenge has been determining how to protect the right of an incompetent individual. However, while a liberty interest may exist, the state has many important countervailing interests as well. This is most obvious when the DNR is for a child. Certainly the law has not progressed to the point that an infant is considered competent to decide such an important question of medical treatment. Courts that have attempted to balance an individual's liberty interest against the state interest in preserving life, protecting family members and loved ones, and protecting the integrity of the medical profession, have found that there are appropriate limitations a state may place on the exercise of this interest on behalf of incompetent individuals.

Traditionally DNRs have been used in hospitals and nursing homes. A doctor issues a DNR to provide specific instructions for the medical care to be provided or withheld from a patient in the doctor's care. With advances in medical technology, individuals with persistently life-threatening illness and disability are no longer confined to the hospital and nursing home. The increasing number of medically fragile students in the schools, cared for by the schools, means that parents will increasingly ask schools to honor DNRs that otherwise would be directed to hospital or hospice employees.

One state court has granted parents a declaratory judgment that the school district's refusal to honor DNR would violate their minor child's constitutional right to refuse medical treatment. *See ABC School v. Mr. & Mrs. M.*, 26 IDELR 1103 (Mass. Sup. Ct. 1997). Minor M. was a four-year-old girl with severe mental and physical disabilities. When her medical condition deteriorated significantly, she suffered an apneic spell and her breathing ceased. The school nurse administered care until an ambulance transported her to the hospital.

Minor M.'s private physician evaluated her and, after consulting Minor M.'s parents, issued a DNR. The DNR stated in part:

> should Minor M. have a cardiorespiratory arrest, she may receive oxygen, suction and stimulation. She should receive rectal valium if she appears to be having a prolonged seizure. Minor M. should not receive cardiopulmonary resuscitation, intubation, defibrulation, or cardiac medications. Invasive procedures such as arterial or venous puncture should only be done after approval of her parents.
>
> Should Minor M. have an apneic spell at school, she should receive oxygen, suction and stimulation. If she responds to this, her parents should be contacted and she can be transported home. If she does not respond, she should be transported by ambulance to the local hospital.

When ABC School was given the DNR, the school said it would refuse to honor the DNR because it conflicted with the school's "Preservation of Life Policy." Furthermore, the school's nurse believed that honoring the DNR violated her professional ethics.

The court recognized that the parents had a right to refuse unwanted medical treatment for their daughter. It was also emphasized that the DNR did not require any affirmative action that would conflict with the school's policy or the nurse's professional ethics, rather the DNR only had the nurse and the district refrain from doing anything. Furthermore, the court denied the school's request for declaratory relief that officials who administered CPR would be immune from damages under the statute that grants immunity to school employees who provide first aid to incapacitated students.

PROVIDING SERVICES TO THE DISABLED

The United States Constitution, and state constitutions guarantee equal protection of the law. In addition, public schools are subject to Section 504 and the IDEA, as well as the ADA. In combination, students with special needs are afforded considerable protection from discrimination on the basis of disability. Even if there is a protected liberty interest in refusing life-sustaining or resuscitating medical treatment for a child, the state has an important interest in protecting the disabled from discrimination that some have argued should prevent a school district from observing a request to honor a DNR. It is not unrealistic to fear that honoring a DNR might raise claims of discrimination. *See Lewiston, Me. Public Schools*, 21 IDELR 83 (OCR Mar. 31, 1994).[1]

The mother of a student in Lewiston, Maine, presented the public school with a DNR order from the student's physician. The student was a twelve-year-old girl suffering from spastic cerebral palsy, progressive scoliosis, and severe developmental delays. The school's initial response was to follow a standard policy against honoring such requests. When the student's physician explained that cardiopulmonary resuscitation would be particularly harmful to this student, the school decided to honor this request.

A disability advocacy group filed a complaint with the Department of Education's Office for Civil Rights ("OCR"). The group alleged that the school was discriminating against this student, because of her disability. In particular the group complained that the school was not going to provide the same life-sustaining services for this particular student because of the severity of the student's disability. Ultimately the school changed its policy once again. OCR investigated the complaint, analyzing it under Section 504 and Title II of the ADA. OCR issued a letter ruling in favor of the school's final approach.

The school's new policy, according to OCR, prohibited school personnel from honoring the requests of parents or others to withhold life-sustaining emergency care from any student who might need that care while the student is under the control and supervision of the school system. The policy did not treat disabled and nondisabled students differently. However, when students' individual needs might require, the school will create a multidisciplinary team to develop an individually designed medical resuscitation plan.

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[1] The background facts for this dispute were gathered by Eric Herlan and are taken from his article on this issue in Inquiry & Analysis the following year. *See* Herlan, Eric R., *Is There a Right to Die on School Grounds? How to respond to DNR Orders in School*, INQUIRY & ANALYSIS, January 1995.

OCR looked at the plan developed for the student at issue. The plan described the specific positive steps that would be taken to provide the student with life-sustaining emergency care if it were required. It provided that the plan would expire on a specific date each year and a new plan would have to be developed. Furthermore, each year the school could request a second medical opinion from a mutually agreeable physician on the appropriateness of the plan.

Besides approving the plan itself, OCR approved the approach taken in developing the plan, because it conformed to generally acceptable practices in developing programs for students with disabilities. The school created a multidisciplinary team of persons who knew the student. The team included the student's parent, physician, and appropriate school personnel. The team considered information about the student, including expert medical opinion. The team recorded and appropriately documented its decisions. The plan itself required a second medical opinion, would be reviewed periodically and had a limited duration.

It should not be surprising that a one-size-fits-all policy, or a policy that specifically treats disabled students differently, or a policy that is followed for everyone but disabled students would draw fire. The individualized approach to addressing the unique needs of disabled students is codified in the IDEA. Such an approach is also compatible with recent Supreme Court disability decisions.

In 1999, the U.S. Supreme Court clarified the "substantial limitation" analysis for determining ADA coverage. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999);

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). In doing so, the Court emphasized that the ADA mandates an "individualized inquiry" be used in all situations of alleged disability. Although these cases analyzed the issue of disability determination, the same individualized determination should apply to accommodations. This individualized approach is equally applicable under Section 504. *Cf. Pacella v. Tufts University School of Dental Medicine*, 66 F. Supp. 2d 234 (D.Mass. 1999) (applying *Sutton*, *Murphy*, and *Albertsons* in Section 504 case).

ESTABLISHING DNR POLICIES

The fact that the Constitution protects the liberty interest of a minor to refuse medical treatment, including life-sustaining treatment, does not end the analysis. The difficulty for the school is determining when it must honor a DNR to protect the student's right to refuse life-sustaining emergency medical treatment and when it must provide such treatment, despite a DNR, to protect the student from abuse and the state's interest in preserving the life of children. *Cf. M.N. v. Southern Baptist Hospital of Fla.*, 648 So. 2d 769, 771 (Fla. Ct. App. 1994) (parents may reject medical treatment for child unless there is sufficiently compelling medical evidence that child's welfare best served by disputed treatment invoking state's *parens patriae* authority).

Just as the *Cruzan* court concluded that under the Constitution, Missouri could require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life sustaining treatment, a school does not necessarily have to honor any DNR with which it is presented. As the law traditionally does not recognize a minor as competent to make such an important decision, someone else must make that decision for a minor. State law defines who can legally determine that extraordinary measures should not be taken to continue a child's life, what standards govern that determination, and what procedures must be followed reach it.

The Maryland Attorney General issued a formal opinion that public schools must accept and follow a valid DNR order if the child's attending physician has issued the order on the authorization of the child's parents. *See* 79 Opinions of the Attorney General No. 94-028 (Md. 1994). Parents have the right to make educational and medical decisions for their minor children, unless their decisions jeopardize the health and well-being of their children. *See Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder"); *Pierce v. Society of Sister*, 268 U.S. 510, 534-35 (1925) ("liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (Fourteenth Amendment right to "bring up children"). Generally, courts uphold parents' rights to refuse medical treatment as long as the refusal is within the realm of reasonable medical choices, as typically defined by the child's physician. *Cf. Parham v. J.R.*, 442 U.S. 584 (1979) (parents retained substantial, if not dominant role in decision to confine child to mental hospital for medical treatment absent finding of abuse or neglect).

Although the theory of parental autonomy generally gives parents the right to make these important decisions for their children, the state has important and compelling interests also. "[T]he power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child." *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972). It is on this basis, that courts will sometimes order medical treatment for children over the objection of their parents. *See M.N. v. Southern Baptist Hosp. of Fla.*, 648 So.2d 769 (1994). However,

> As with the parent-child relationship, the state's *parens patriae* authority is . . . not entirely unfettered. Rather, the state's interest diminishes as the severity of the affliction and the likelihood of death increase:

> There is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where . . . the issue is not whether, but when, for how long and at what cost to the individual . . . life may be briefly extended.

Id. at 771 (internal quotations and quoted case omitted).

Some states may have laws that require prior judicial approval before honoring a DNR requested by a parent or guardian. One court has held that it was appropriate for a hospital to obtain a judicial determination regarding a patient's DNR, because the hospital questioned the validity of the health care proxies held by the patient's son. *See In re Guardianship of Mason*, 669 N.E.2d 1081 (1996). However, most courts frown upon such interference in what is intended to be a private decision. *See Department of Inst., Grand Junction Regional Center v. Carothers*, 821 P.2d 891(Colo. App. 1991) (holding that decision whether to consent to DNR order on behalf of incompetent minor child should be made by guardians under substituted judgment approach without interference from court); *cf. Conservatorship of Drabick*, 200 Cal. App. 3d 185 (1988) (not court's role to substitute judgment for conservator's; noting that no court has held prior judicial approval is required to remove life-sustaining treatment from patient in persistent vegetative state); *Barber v. Superior Court*, 147 Cal. App. 3d 1006 (1983) (agreeing with other courts that requiring judicial intervention in all cases concerning cessation of life-sustaining treatment is unnecessary and may be unwise).

The courts that have recognized that DNRs do not require prior judicial approval are likely to frown upon efforts to review uncontroversial treatment decisions simply because the care provider wants to be shielded from liability. *Cf. Care and Protection of Beth*, 587 N.E.2d 1377 (Mass. 1992). However, this general rule has vague boundaries. Courts are more sensitive to the interests of a child's own parents than the interests of other individuals to whom a child has been committed for care. There are many different kinds of surrogate decision makers besides parents and some states may encourage resolving DNR requests with a judicial determination if the patient is a ward of the state who has no family with whom physicians may consult. *Compare Custody of a Minor*, 434 N.E.2d 601 (Mass. 1982), *with Care and Protection of Beth*, 587 N.E.2d 1377 (Mass. 1992).

The *Quinlan* court concluded that the only practical way to prevent the loss of Ms. Quinlan's privacy right due to her incompetence was to allow her guardian and family to decide whether she would exercise it in these circumstances. *Quinlan*, 355 A.2d at 664. Likewise, the *Belchertown* court adopted a "substituted judgment" standard whereby courts were to determine what an incompetent individual's decision would have been under the circumstances. *Belchertown*, 370 N.E. 2d at 427, 431, 434. The court in *Custody of a Minor*, 434 N.E.2d 601 (Mass. 1982), held that the substituted judgment standard is appropriate for the decision whether to place a DNR order on the chart of an incompetent minor patient. Physicians caring for the child asked the Department of Social Services, which had custody of the child, for consent to an order which would bar heroic efforts to save the child's life. The court approved both tests used to determine the appropriateness of the order. Under the "substituted judgment" test, the court assumed the child's "mental mantle" and sought to act on the same motives and considerations as would have moved the child. The court also approved using the familiar "best interests" of the child test. Significantly the evidence supported the findings under both tests.

When a court does review a decision to request a DNR on behalf on a minor, the reviewing court can only effectively review the decision of the surrogate. The substituted judgment standard seeks to answer the question of what would the patient decide if the patient were competent to make the decision herself. When the court assumes that minors are incompetent, the substituted judgment standard must merge with the best interests of the child standard. *Cf. Care and Protection of Beth*, 587 N.E.2d 1377 (Mass. 1992) (holding that two tests are consistent in that criteria and basic reasoning are same).

Almost universally, when courts examine whether a DNR order was issued improperly, they apply the legal standard of "best interests." This is the standard traditionally used in family law and other settings where the state is exercising its *parens patriae* authority at the expense of parental autonomy. It is regularly used in medical situations involving minor children and requires that the decision maker (usually the parent, in collaboration with the physician) base the decision on what she believes to be in the best interest of the child. Thus parents can generally accept or reject medical treatment that they believe is not in their child's best interest, unless countervailing state interest takes precedence. Third parties may sometimes assert the state's interest by stating that the DNR order should not be honored because to do so would not be in the child's best interest.

The "best interests" of the child seems a more appropriate inquiry for courts and some courts will not pursue a substituted judgment analysis, because, "almost by definition, an infant has no judgment to be substituted." *In re C.A.*, 603 N.E.2d 1171 (Ill. App.), *app. denied*, 610 N.E.2d 1264 (1992). When the Illinois appellate court addressed the issue of treatment for a premature baby addicted to cocaine, the court explained that with an immature minor, it is more likely that the judgment of the parents or some other close person would be substituted, and not the judgment of the child. In determining what information a guardian should consider in making a determination regarding an incompetent's DNR, one court has stated that evidence of the patient's wishes was unnecessary, because the issue was the best interests of the ward. *In re Warren*, 858 S.W.2d 263 (Mo. App. 1993).

When school districts are not presented with a court order along with the request to honor a DNR, one issue that might come up is the sometimes-conflicting wishes of parents. This is a familiar dilemma for school districts in many contexts such as issues of child custody. It has a special importance when it is the life of the child at stake. For example, in the case of *In re Doe*, 418 S.E.2d 3 (Ga. 1992), where one parent wanted a

DNR order regarding her daughter, who had medical problems since birth, and the other parent did not want the order, a hospital filed a declaratory judgment action to determine which of the parents' wishes to follow. The court noted that generally, if the legally responsible guardians approve a DNR, no judicial intervention is required. However, when the parents disagree it places the care provider in an unusual legal quandary and the court established a rule for future use. The court held that one parent's consent to a DNR order was sufficient for its enforcement, unless the other parent revoked consent, in which case the order could not be enforced.

The issue of who is authorized to request a DNR on behalf of a minor is even less clear as the minor approaches majority. Sometimes, when a mature minor is involved, the minor needs to be consulted about the decision to issue a DNR. *See Belcher v. Charleston Area Medical Center*, 422 S.E.2d 827 (W. Va. 1992). In *Belcher*, parents of a seventeen year old with muscular dystrophy sued the hospital that failed to resuscitate him. During previous treatment, the parents had requested a DNR and when he was subsequently admitted after a choking episode the hospital adhered to the DNR in the chart. The parents' suit was brought under a theory of informed consent and the court held that a "mature minor" exception to the general rules regarding informed consent applied equally to consent to DNRs. The hospital should have asked the boy.

Further complicating the determination are DNR orders by a physician directed to another health care professional. In many states licensed health care professionals may be subject to sanctions from their licensing board for not following a physician's orders. Without exception, only a licensed physician can direct such an order and the order cannot be directed to a layperson. Consequently, the presence of a licensed health care professional is necessary for the activation of a DNR order. If state law specifically requires that directives regarding life-sustaining care be followed outside a health care facility, there is a somewhat greater likelihood that a court would rule that schools are not exempt from this requirement.

School districts must be able to evaluate the authority of any request to honor a DNR with which the school district is presented. The criteria by which any such request will be evaluated, is determined by ascertainable state law. However, given unique circumstances of each student and each request, any policy a school district develops must provide for an individual evaluation.

POTENTIAL LIABILITY

Most state courts uphold the school's relationship to a student as one of *in loco parentis*. The assumption is that the school protects the child from harm and would do what the parent would do under similar circumstances. The *in loco parentis* doctrine, together with the doctrine of informed consent, allows a school to provide emergency medical treatment to a student where the parent has provided no direction. Where the standard of care is to provide first aid and cardiopulmonary resuscitation for a dying student, a school district might be negligent to do nothing. However, violating the parent's wishes expressed in a valid DNR could put school personnel at risk of liability for battery and a variety of other torts, as well as subjecting the child to unnecessary disturbance and injury.

Schools are obviously concerned with the potential liability of honoring a DNR issued by a physician without a court order. In *Kay v. Fairview Riverside Hosp.*, 531 N.W.2d 517 (Minn. App. 1995), the court held that once a patient's physician placed a DNR on the patient's chart, the hospice where the patient lived had no independent duty to gather additional consents to the order. Nevertheless, a school district should be sure that this comports with its state's law, because courts have found liability under a wrongful death theory for improperly issuing a DNR order in the first place. *See Payne v. Marion General Hospital*, 549 N.E.2d 1043 (Ind. App. 1990); *Belcher v. Charleston Area Medical Center*, 422 S.E. 2d 827 (W. Va. 1992).

School districts may face greater liability for failing to honor a DNR. In *Anderson v. St. Francis-St. George Hospital*, 671 N.E.2d 225 (Ohio 1996), the court recognized that recovery for resuscitating a patient in violation of a DNR might exist under appropriate circumstances. Although Ohio did not recognize a claim for "wrongful life," consequences for breach of specific instructions limiting medical treatment included damages for battery and licensing sanctions against the medical professionals. The court said it would limit damages to those available under battery or negligence theories rather than considering the extent of suffering beyond that which would have occurred if the lifesaving measures had not been initiated. In this particular case, however, the court awarded no damages because it could identify no harm as a result of the resuscitation. This despite the fact that patient responded to CPR but suffered a stroke two days later and thereafter was paralyzed on his right side, unable to walk, and incontinent for the remaining two years of his life. In the school setting there may be addition claims under the IDEA, Section 504, and the ADA.

In addition to the direct liability for harm to the child subject to a DNR, many schools are appropriately concerned about the possible emotional harm to other children in the school. However, the greatest emotional risk to young students comes from the death of their peer. With a medically fragile child subject to a DNR, that death is inevitable. Steps can be taken to remove other children if a medically fragile child is dying and schools should consider this as part of an overall plan. If a school plans carefully they should be insulated from potential claims for emotional distress, because such claims depend upon negligent or intentional conduct.

CONCLUSION

The National Education Association ("NEA"), the National Association of School Nurses ("NASN"), and the American Academy of Pediatrics ("AAP"), have all developed positions on honoring DNR requests. None of these organizations have taken the position that schools should not honor a DNR and none of these organizations have taken the position that schools should honor a DNR without question. Schools should carefully consider the validity of the DNR under state law and then respond carefully to the individual situation. "A request for do not resuscitate (DNR) orders from a parent to school system personnel may represent the parent's and in some cases the child's wish for the school to recognize the stage of the child's illness. A DNR order is not synonymous with abandonment of all medical treatment and does not, of itself, rescind the obligations of the health care team to provide quality care, such as suction, oxygen, and pain medications. Rather it is a dynamic part of the management plan to be reviewed with the family." American Academy of Pediatrics, Policy Statement, *Do Not Resuscitate Orders in Schools* (RE9842) (April 2000).

Ultimately, schools have special obligations to students with special needs under federal law and obligations under the Constitution to protect the rights of all students equally. Medically fragile students have a right to a free appropriate public education provided by the public schools. However, while the right is generic the students are unique and each child should have an individually developed plan appropriate for that student. In appropriate cases the individualized care plan should address life-sustaining treatment as well.

Practical Considerations in Developing a DNR Policy

1. **Individualized Determination** – Part of Student's IEP or IHP – Consider DNR Order Written by Physician when Developing Plan
2. **Review State Law** – Consider State Regulation of DNRs and Federal Protections for Disabled Students
3. **Confidentiality**
4. **Multidisciplinary Approach** – Involve Parents, Pediatrician, School Nurse, Teachers, Counselors, Administrators, and Local EMS Personnel
5. **Frequent Review** – Maximum Effective Term with Review Upon Request by Parent or Student
6. **Evaluate Available Community Resources and Consider Impact on School Resources** – Availability and Qualifications of Health Care Professionals
7. **Training**
8. **Other Students** – Anticipate Needs to Address Issues of Death and Dying
9. **Obtaining an Independent Medical Opinion**
10. **Legal Counsel Review of Plan**